SUPREME COURT, U. S.
FILED
JUN 18 1970
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

No. 279

UNITED TRANSPORTATION UNION,
Petitioner,

v.

CLINCHFIELD RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals for the Sixth Circuit

To the United States Court of Appeals for the Sixth Circuit:

Petitioner, United Transportation Union, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cause on March 4, 1970. Petitioner's motion for rehearing was overruled by the Circuit Court of Appeals on March 24, 1970.

I. CITATIONS TO OPINIONS BELOW

Judgment in the United States District Court for the Eastern District of Tennessee, Northeastern Division was by memorandum opinion and order granting respondent's motion for summary judgment, and a copy of the opinion (not yet reported) and order is appended hereto (Appendix A — P. 1).

Judgment affirming the judgment of the United States District Court for the Eastern District of Tennessee, Northeastern Division, was by per curiam order (not yet reported) of the United States Court of Appeals for the Sixth Circuit. A copy of the order is appended hereto (Appendix A — P. 10).

A copy of the order refusing and denying Appellant's motion for rehearing by the United States Court of Appeals for the Sixth Circuit is also appended hereto (Appendix A — P. 11).

II. GROUNDS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Sec. 1254-(1).

Petitioner's cause of action arises under the Railway Labor Act, Ch. 8, 45 U.S. Code, Sec. 153, Second, and a right or privilege is asserted by petitioner under this act of congress. The trial court had jurisdiction under 28 U.S.C.A., Sec. 1337. The Courts below have decided substantial questions arising under the Railway Labor Act 45 U.S.C.A., Sec. 153, First and Second contrary to the plain

language and intent of the act, and contrary to the decisions of other courts of appeals, and probably not in accord with applicable decisions of this Court.

III. QUESTIONS PRESENTED

1. Whether the pleadings, admissions and affidavits on file in this case raised a genuine issue of material fact before the trial court as to the authority and right of Public Law Board No. 92, created by the parties pursuant to the provisions of the Railway Labor Act, 45 U.S.C.A., Section 153; Second, to hear and decide all claims of dates and record made by switchmen employed by Defendant and represented by Petitioner, other than those claims which were listed in Attachment "A" annexed to the agreement creating said special law board, so that the trial court's order granting defendant's motion by counterclaim for summary judgment, denied Petitioner herein the right to fully present its case for enforcement of Award No. 1 of said public law board upholding such claims.

2. Whether an award of a Public Law Board created by the parties pursuant to 45 U.S.C.A., Section 153, Second, Public Law 89-456, 80 Statutes 208; 209, is final and conclusive upon the parties and not a subject of review by the Courts as was held by the Court in *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees v. Special Board of Adjustment No. 605 and AT&SF Railway Co.*, 286 F. Supp. 397 (N.D. Ill. E.D. 1968) affirmed, 410 F. 2d 520 (7th Cir. 1969).

3. Whether the United States Court of Appeals for the Sixth Circuit erred in affirming the judgment of the trial

court holding that an award in favor of those claimant switchmen not included in the docket designated as Attachment "A" of the agreement creating Public Law Board No. 92 constituted a failure to conform or confine the award to matters within the scope of the jurisdiction of such board and that such board was without right or authority to hear and determine the claims of record of other switchmen which were not listed in said docket, and whether the Court of Appeals erred in failing to hold that the trial court could enforce such award on behalf of those switchmen for whose benefit such award was made, who were not listed in Attachment "A" as is plainly authorized by the language and intent of the Railway Labor Act, 45 U.S.C.A., Section 153, First, and 153, Second, and the decisions in *Gunther v. San Diego — Arizona Eastern Ry. Co.*, 382 U.S. 257, 86 S. Ct. 368, 15 L. Ed. 2d 308 (1965); *U. P. R. R. v. Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959); *B. of R. T. v. Chicago River & Indiana R. R. Co.*, 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957); *Slocum v. D. L. & W. R. R. Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795, (1950); *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424, 1960); *B. of R. T. v. D. & R. G. Western Railroad Company*, 370 F. 2d 833 (10th Cir. 1967) Cert. denied 386 U.S. 1018, 87 S. Ct. 1375, 18 L. Ed. 2d 456 (1967); *Hodges v. Atlantic Coast Line R. R. Co.*, 363 F. 2d 534, 537, (5th Cir. 1966); *Northwest Airlines, Inc. v. Air Line Pilots Association International*, 373 F. 2d 136 (8th Cir. 1967); *Kirby v. Pennsylvania Railroad Company*, 188 F. 2d 793 (3rd Cir. 1951); *Powell v. Pennsylvania Railroad Company*, 166 F.

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IV. STATUTES INVOLVED

These are set out in Appendix "B".

45 U.S.C.A. Sec. 153, 1st (P)

45 U.S.C.A. Sec. 153, 1st (Q)

45 U.S.C.A. Sec. 153, 2nd

Rule 56 (C) and (E), Federal Rules of Civil Procedure

28 U.S.C.A. Sec. 1337, Commerce and Anti-Trust Regulations

MATERIAL FACTS

Petitioner and Respondent, Clinchfield Railroad Company, mutually agreed on August 27, 1967, to the establishment of Public Law Board No. 92 to resolve certain disputes, involving time claims otherwise referrable to the National Railway Adjustment Board, arising out of the interpretations of agreements then in effect between the parties. (Appendix C, P. 4). The docket of claims attached to the agreement establishing the board referred to as Attachment "A", listed six members of Petitioner's union who had filed time claims with Respondent claiming pay because as yardmen of Respondent they were required to do the work of Carmen in handling aprons at the piggyback track in

Kingsport, Tennessee, in violation of the agreement then in effect between the parties. The Board convened on February 29, 1968 to decide the dispute. Petitioner's statement of its claim in its ex parte submission to the Board, was:

> "* * * claim is being made for one day's pay at pro rata rate for switchman H. Martin, January 13, 1967, and all other claimants and dates of record, account of switchmen performing other than their regular duties, i.e. lifting and placing steel aprons (runways) on piggyback cars on piggyback track, Kingsport, Tennessee." (Appendix A-65 Petitioner's Brief in Ct. App.).

Respondent's statement of claim set out in its brief on submission to the Board was:

> "Claim of H. Martin and other yard foremen and helpers for a carman's day account handling aprons of piggyback flat cars on the piggyback track at Kingsport, Tennessee, on January 13 and other dates in the month of January, 1967, which claims and dates are enumerated and outlined in Attachment 'A' to the agreement dated August 22, 1967, establishing this board." (Appendix A-76 — Petitioner's Brief in Ct. App.).

When the Public Law Board convened on February 29, 1968, Respondent's personnel officer, L. R. Beals was handed a brief in support of Petitioner's position. Mr. Beals' affidavit, filed in support of Respondent's motion for summary judgment, claimed that this was the first time that he knew that Petitioner was contending that the Public Law Board created by the agreement was to decide and arbitrate any claims other than those listed in the agreement establishing the board. Respondent made its position known to the neutral member of the Board at the hearing and contended that the statement of claims contained in peti-

tioner's presentation was contrary to the agreement establishing the Board and that the Board had no jurisdiction of any claims not listed in the agreement creating the Board. (Appendix C, P. 15).

Thereafter, on March 1, 1968, Public Law Board No. 92 made its award number one sustaining Petitioner's claim just as presented in its ex parte submission to the Board. (Appendix C, P. 1).

The Board's award recited that it had jurisdiction based upon the whole record and all the evidence. (Appendix C, P. 1).

Thereafter Respondent paid the claims of the six switchmen whose names were listed in Attachment "A" and refused to pay any of the other claims or dates of record. (Appendix C, P. 6).

Petitioner, on behalf of its members, who were beneficiaries of the award, then filed suit in the United States District Court for the Eastern District of Tennessee, Northeastern Division to enforce said award pursuant to 45 U.S.C.A., Section 153, Second (Appendix B—P. 3).

Respondent, by way of answer and counterclaim, sought to have the award set aside because the award was outside the scope of the agreement and because the award did not direct the Defendant to comply therewith on or before a day named and asserted that said Board was without jurisdiction to hear and determine claims not listed in Attachment "A". Respondent prayed that (1) the complaint be dismissed, and (2) that it have judgment that

the award filed as Exhibit "A" to Petitioner's complaint be limited to the persons and dates listed in the docket setting up the Board. (Appendix C, P. 26). Thereafter Respondent filed a motion for summary judgment on the ground that there was no genuine issue as to any material fact and that Respondent was entitled to judgment as a matter of law (Appendix C, P. 34). The Motion for Summary Judgment was supported by affidavits of four of Respondent's employees, Beals, Pratt, Rice, and Stultz. The affidavits of the latter three are largely corroborative of Beals' affidavit. Beals contended that he learned for the first time when the Board convened on February 29, 1968, that Petitioner claimed the Board was convened for the purpose of hearing and disposing of not only the time claims listed in Attachment "A", but all other claimants and dates of record. It was Respondent's position that the board has no jurisdiction to decide any claims not listed in the agreement. (Appendix C, P. 18).

Petitioner opposing the Motion for Summary Judgment, filed supporting affidavits of George Clark, Vice-President of the then Switchmen's Union of North America and P. K. Elliott, General Chairman for the Switchmen's Union of North America on the Clinchfield Railroad. In his affidavit, Mr. Clark stated that he was familiar with the facts leading up to the establishment of Public Law Board No. 92; that on August 22, 1967, he and Mr. Elliott met with Mr. L. R. Beals in Erwin, Tennessee, at which meeting they discussed the time claims that had been presented and the establishment of a Public Law Board to decide the dispute; that at

this conference, he and Mr. Elliott had with them only a few of the time claims which had been submitted to Respondent and had been declined, inasmuch as all of the time claims involved the same principle; that the claims which had been filed were considerable in number and were voluminous; that he did not consider it necessary to discuss or list each and every claim which had been submitted to Respondent because of the time which would have been consumed in doing so, and because each claim involved a continuing violation of the contract; that they were discussing a principle which was involved, that is, a continuing violation of the contract; that some claims were withdrawn which did not bear dates or names but that he never agreed, as Mr. Beals stated in his affidavit, that it would be useless to submit such claims to a Public Law Board because they were barred by a limitation rule. He denied telling Rheba Pratt not to list any claims prior to February 22, 1967 or any that were finally declined between September 5, 1966 and February 22, 1967. He stated that in his twenty-five years experience in handling such railroad grievance matters it had never been the practice to list or itemize each and every claim because of the voluminous work involved and because it had always been the practice to take a claim or claims and use them as a pattern case for claims of a similar nature and that once a dispute concerning a claim had been decided and a pattern established it was used for the settlement of all claims of a similar nature. That Mr. Beals must have known from the discussion that not only were the claims listed in Attachment "A" in controversy but he must have known that other claims which he had declined and returned

to Mr. Elliott were in controversy. That it would be foolish to set up a Public Law Board to decide only the few claims as listed in Attachment "A". That the expense would prohibit this, and since the violation of the contract by Respondent was a continuing thing there would be no purpose in setting up a board to decide only a few claims when other violations were occurring daily; that the purpose of establishing the board was to decide the dispute so that the recurring claims could be disposed of based upon the board's decision; that all of the claims which were a matter of record in correspondence between the Switchmen's Union and the Clinchfield Railroad were not listed in Attachment "A" merely to expedite the drafting of the agreement establishing the board; that it was known to all parties and to Mr. Beals that there were numerous claims of an identical nature in addition to those listed in Attachment "A", and that Mr. Beals likewise knew that there was a continuing dispute occurring almost daily over the railroad practice; that this matter had been discussed with Respondent's train master, superintendent and Mr. Beals; that if Mr. Beals at said conference had contended that the only claims which the Public Law Board was being created to decide were those listed in Attachment "A", he would not have signed the agreement setting up the board because of the daily recurring violations. (Appendix C, P. 7).

Mr. Elliott stated in his affidavit that he was familiar with the facts and circumstances leading up to the establishment of the board and his affidavit verifies substantially the statements of Mr. Clark. He also stated the claims set out in

Attachment "A" of the agreement establishing the board were simply samples of many other claims being made for continued violations of the contract. That there would be no point in creating a special board to hear only those claims listed in Attachment "A" and that if the decision of the board on those claims was not to be used as a pattern to settle all similar claims, he would have been compelled to negotiate the other claims with the railroad, and failing to agree set up another special board (Appendix C, P. 11).

In the face of those controverting affidavits the trial court, on the 7th day of May, 1969, granted the motion of Respondent by counterclaim for a Summary Judgment dismissing the complaint of Petitioner. (Appendix A, P. 1). This judgment was affirmed by the Sixth Circuit Court of Appeals on the 4th day of March, 1970. (Appendix A, P. 11). Rehearing was denied on the 24th day of March, 1970. (Appendix A, P. 11).

V. REASONS FOR GRANTING THE WRIT

The writ should be granted because the papers, admissions and affidavits on file before the trial court raised a genuine issue of fact as to whether Public Law Board No. 92 was created for the purpose of resolving the dispute between Petitioner and Respondent as to all time claims of dates and record, arising out of a continuing violation of the contract between Petitioner and Respondent, rather than for the limited purpose of hearing only those claims listed in Attachment "A", and the summary judgment in Respondent's favor deprive Petitioner of the benefits of the Railway Labor Act, 45 U.S.C.A., Section 153, Second.

As the moving party, Respondent had the burden of establishing that there was no genuine issue of material fact, from the pleadings, affidavits and admissions before the trial court. *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (1944).

The inference to be drawn from the underlying facts contained in affidavits, pleadings and exhibits must be viewed in the light most favorable to the party opposing the motion. *U. S. v. Diebold*, 369 U.S. 654, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

The papers supporting the movants' position are closely scrutinized while the opposing pages are indulgently treated. *Bohn Aluminum and Brass Corporation v. Storm King Corporation*, 303 F. 2d 425, (6th Cir. 1962); *Semaan v. Mumford*, 335 F. 2d 704 (C.C.A., D.C. 1964).

The issue of material fact required by Rule 56(e) (Appendix B, P. 6) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the party's differing versions of the truth at trial. *First National Bank of Arizona v. Cities Service Company*, 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968).

The trial court's granting of a summary judgment in this case was clearly contrary to the decision of this Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458, (1962); holding that Rule

56(c) (Appendix B, P. 6), authorizes a summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that the purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try.

This Court denied a writ of certiorari in *S. J. Groves and Sons Company v. Ohio Turnpike Commission*, 315 F. 2d 235 (6th Cir. 1963). Where this court said, "It is often the case that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts, what the intention of the parties was as shown by the facts, * * *. Under such circumstances the case is not one to be decided by the trial judge on a motion for summary judgment."

The affidavits of George Clark and P. K. Elliott are unequivocal in denying the statements in the affidavits of Respondent's personnel officer, L. R. Beals, and the corroborating affidavits of its employees, Pratt, Rice and Stultz. (Appendix C, P. 7). Both Mr. Clark and Mr. Elliott contradict the statement of Mr. Beals that at the time of the conference in Mr. Beals' office in Erwin, Tennessee, on August 22, 1967, that he did not have personal knowledge of any time claims in dispute between the switchmen's Union of North America and the Clinchfield Railroad Company except those listed in the docket attached to the agreement creating the Special Law Board. And that neither Mr. Clark nor Mr. Elliott called his attention to any other claims and that he had agreed to submit only those claims

listed to the decision of the Public Law Board. They categorically deny Mr. Beals' statement that Mr. Beals knew for the first time when the Board convened on February 29, 1968, that it was the contention of Petitioner that such Board was to arbitrate any claims other than those listed in the agreement establishing the Board. (Appendix C, P. 9). On the contrary, both stated that this was the first time Mr. Beals had stated that the hearing was limited to the named claims (Appendix C, P. 10). Both Mr. Clark and Mr. Elliott explained why all time claims were not listed, i.e. because they were numerous and voluminous and that it was unnecessary since the problems they were discussing concerned a continuing violation of the contract, which was understood by Mr. Beals. (Appendix C, P. 8). Both also stated that the purpose in establishing the Board was to decide the dispute so that the recurring time claims could be disposed of based upon the Board's decision. (Appendix C, P. 9).

Mr. Clark stated that in his twenty-five years experience in handling such railroad grievance matters it had never been the practice to list or itemize each and every claim because of the voluminous work involved and that it had always been the practice to take a claim or claims and use them as a pattern case for claims of a similar nature, and that once a dispute concerning a claim had been decided and a pattern established it was used for the settlement of all claims of a similar nature. (Appendix C, P. 8).

The controverting affidavits of Mr. Clark and Mr. Elliott clearly raised an issue of fact as to the intention of the parties in setting up the Board.

It is evident from the affidavits of Mr. Clark and Mr. Elliott, the material portions of which are set out under "Material Facts", page 8, of this application, that their intention in signing the agreement establishing the Board was that it would have no such limited function as Respondent contends it was to have.

Upon a full hearing, evidence as to the practice in the industry with respect to the functions of such Boards would have justified a conclusion that the crucial issue was whether the Board was to decide and adjudicate all time claims of record growing out of the contract violation. Members of such a Board understand railroad procedures and speak the railroad jargon. The Lower Courts should not have interpreted this contract but should have left this question to be determined by the special Board which heard the contentions of the parties as to the purpose of the Board at the very outset of the hearing. (Appendix C, P. 1). *Elgin Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 748, 65 S. Ct. 1281, 89 L. Ed. 1886, PP. 1907, 1908 (1945). These men composing the Board were peculiarly fitted to decide the preliminary dispute as well as the basic dispute. In *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, (C.C.A., D.C. 1941), judgment affirmed on Writ Cert. 319 U.S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694 (1943), the Court in construing the effect of an award of the first division of the National Railway Adjustment Board made pursuant to 45 U.S.C.A., Section 153, First (p) said,

> "* * * They also bring to the Court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and

> complicated character. The whole adjustment procedure up to the point of award, findings and order by the BOARD, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers, alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. * * *"

This Court in *Gunther v. San Diego Arizona Eastern Ry. Co.*, 382 U.S. 257, 86 S. Ct. 368, 15 L. Ed. 2d 308 (1965), and in denying certiorari on *Washington Terminal Company v. Boswell*, 124 F. 2d 235, (C.C.A., D.C. 1941) Judgment affirmed on Writ Cert. 319 U.S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694 (1943), has recognized the weight and persuasiveness of the judgment of railroad men familiar with the wide range of grievances that are everyday problems in the railroad world and who are acquainted with the industry's language, customs and practices.

Further the motion for summary judgment was improvidently granted because Respondent's supporting affidavits were all made by its employees. They were interested witnesses and such testimony does no more than raise an issue of fact. *Roadway Express, Inc. v. Naturalite, Inc.*, 435 S.W. 2d 555 (Eastland C.C.A. Tex. 1968), *Dobson v. Don January Roofing Company, Inc.*, 392 S.W. 2d 153 (Tyler C.C.A. Tex. 1965), (Refused n.r.e.) Tex. S. Ct. 394 S.W. 2d 790 (1965).

Before the statute 45 U.S.C.A., Section 153 was amended in 1966 by Public Law 89-456, the judgment of the trial court would have been erroneous in an enforcement suit under 45 U.S.C.A., Section 153, First (p). The statute as then constituted provided the findings and order of a division of the Adjustment Board should be prima facie evidence of the facts therein stated. This relieves the employee of the burden of proof at least to some extent where the findings and order of the board are offered in evidence. The order of the board may not make Petitioner's case finally but it does so initially. *Washington Terminal Company v. Boswell*, 124 F. 2d 235 (C.C.A., D.C. 1941), Judgment affirmed on Writ Cert. 319 U.S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694 (1943).

Thus, under the statute before amended, Plaintiff's original complaint and a copy of the award attached as Exhibit "A" was sufficient to overcome a summary judgment.

2. THE WRIT SHOULD BE GRANTED BECAUSE

Award No. 1 of Public Law Board No. 92 sustained all of Petitioner's time claims which were in dispute between the parties and said award is final and binding upon Respondent under The Railway Labor Act, 45 U.S.C.A., Section 153, Second, (as amended June 20, 1966, Public Law 89-456, Sec. 1, 2; 80 Stat. 208, 209), giving Petitioner a right to enforce said award and therefore the granting of a summary judgment by the Trial Court was error.

45 U.S.C.A., Section 153, Second, providing for the establishing of Special Law Boards governs this case and not 45 U.S.C.A., Section 153, First (p) and (q) which relates to

enforcement and review of awards of one of the divisions of The National Railway Adjustment Board. Directly in point is the case of *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees v. Special Board of Adjustment No. 605 and AT&SF Railway Company*, 286 F. Supp. 397 (N.D. Ill., E.D. 1968) Affirmed, 410 F. 2d 520 (7th Cir. 1969). In that case a Special Board was formed for the purpose of settling a dispute which arose as to the application of a mediation agreement to a particular group of employees represented by the Petitioner. The Board ruled against Petitioner and Petitioner then filed suit seeking to set aside the award on the ground that the Special Board resolved a question not before it, and therefore exceeded its jurisdiction, and that the Special Board undertook to interpret a court order which was not properly before it. The Respondent contended that the court did not have jurisdiction, and even if so, the award was not subject to review. The Trial Court granted Respondent's motion for summary judgment, saying:

> "The Court agrees with the Respondent that it does not have jurisdiction to review an award made by a special board of adjustment. Petitioner claims jurisdiction under 45 U.S.C.A., Sec. 153, First (q). However, this provision delegates limited judicial review to the United States District Courts only with respect to the National Railroad Adjustment Board and its enumerated divisions. There is no authorization here to review awards made by special boards.
>
> A subsequent section of the Railway Labor Act authorizes the establishment of special boards by voluntary agreement. 45 U.S.C.A., Sec. 153, Second. This provision sets out the administrative and procedural guide-

lines to be observed by a special board and specifies that its awards shall be final and binding on the parties. Judicial review is not authorized. The legislative history of this Section indicates that Congress authorized special boards as a voluntary procedure to expedite the settlement of minor disputes, thereby alleviating the tremendous backlog of matters pending before the National Railroad Adjustment Board. 1966 U.S. Code Cong. and Adm. News, P. 2285.

Neither case law nor the legislative history of the pertinent provisions of the Railway Labor Act provide a basis for the jurisdiction of this Court to review the award made by special Board of Adjustment No. 605."

The Court of Appeals affirmed, (410 Fed. 2d 520) agreeing with the trial court's reasoning.

In the case before the Court now, Petitioner likewise seeks to enforce an award of a special Board under 45 U.S.C.A. Sec. 153, Second. Respondent here, by counterclaim sought to have the trial court, (1) dismiss Petitioner's complaint, (2) enter a judgment declaring the award limited to the persons and dates listed in the docket in Attachment "A" of the agreement creating the Board (Appendix C, P. 29), and (3) filed a motion for summary judgment seeking to have the trial court dismiss the claim alleged in the complaint because there was no genuine issue of fact and because Respondent was entitled to judgment as a matter of law (Appendix C, P. 34). Thus Respondent was seeking a review of the award. The trial court and Court of Appeals' decision in this case is in direct conflict with the case cited.

Respondent in this case is seeking to come within the provisions of 45 U.S.C.A., Sec. 153, First, (p). We contend this section does not apply to this case, but even if so it should be noted this section and paragraph deals with review and not with enforcement of an award of a division of the National Railway Adjustment Board.

45 U.S.C.A., Section 153, First, (q) differs from Section 153, first, (p) in that it deals with a situation where not only the employee but also the carrier is dissatisfied with an order of a division of the National Railway Adjustment Board.

Paragraph (q) provides that either party may file suit to review an award in the United States District Court in which a petition under Paragraph (p) (Enforcement of an Award) could be filed. Respondent's counterclaim (Appendix C, P. 29) is substantially a petition for review. *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, (C.C.A., D.C. 1941), Judgment Affirmed on Writ Cert. 319 U.S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694 (1943), and Paragraph (q) 45 U.S.C.A., Section 153, First, requires a copy of the petition to be transmitted by the Clerk of the Court to the Adjustment Board. The Adjustment Board is then required to file in the court in which the suit is pending the record of the proceeding on which it based its action.

It is undisputed that Respondent did not follow the statute and do this.

If Respondent was aggrieved by the award in this case the statute provided a remedy (if 45 U.S.C.A., Section 153,

First (p) and (q) applies), by filing a petition for review of the board's award. Respondent failed to do this, recognized the award in part by paying those claims listed in attachment "A", but refused to pay all the claims in dispute. The award was plain and unambiguous. It covered all other claimants and dates of record.

3. THE WRIT SHOULD BE GRANTED

Because the award of Public Law Board No. 92 sustaining all time claims of dates and record rather than only those listed in attachment "A" was within the scope of the board's jurisdiction and the lower courts holding that said award in favor of those not listed in attachment "A" constituted a failure to conform or confine the award to matters within the board's jurisdiction was erroneous.

When Public Law Board 92 convened at 10:00 A.M. on February 29, 1968, the meeting was adjourned until that afternoon so that each party might study the opposition's brief before the hearing started. From the affidavits on file it appears that when the Board reconvened Respondent's personnel officer, L. R. Beals, objected to a consideration of claims other than those listed in attachment "A". (Appendix C, P. 18), and thus the controversy arose as to the scope of the hearing. The Board heard the parties' contradictory contentions and proceeded to determine those matters with respect to the establishment and jurisdiction of the Board which were in dispute. It had the power and

authority to do so under 45 U.S.C.A., Section 153, Second, reading,

> "The members of the Board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the Board." (Appendix B, P. 3).

The majority of the Board disagreed with Respondent's contention. This is apparent from the award which the Board rendered adopting Petitioner's "Statement of Claims". The award covered all claims and dates of record. (Appendix C, P. 1).

There is nothing to indicate that Respondent attempted to withdraw from the hearing when the Board was hearing the contentions of the various parties as to the matters involved, nor is there anything in the record to indicate that Respondent continued to participate in the hearings under protest. By paying part of the claims it recognized the validity of the award.

Respondent's contention that the Trial Court was without right to enforce the terms of said award is based upon its interpretation of Title 45 U.S.C.A., Section 153, First (p), reading,

> "That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform or confine itself, to matters within the scope of the division's jurisdiction * * *".

There is no question that this dispute is a minor dispute under the Railway Labor Act, and one over which the First

Division of the National Railroad Adjustment Board has jurisdiction. 45 U.S.C.A., Section 153, First (h) (Appendix B, P. 4).

This board was created to hear this case because of the long delay which would result in securing a decision from the National Railway Adjustment Board, First Division, due to its heavy docket. (1966 U.S. Code Cong. & Adm. News, PP. 2285, 2286).

If 45 U.S.C.A., Section 153, First (p) and (q) is applicable in this case the question then to be answered is what is meant by "the division's jurisdiction". The Trial Court and Court of Appeals has erroneously concluded this means jurisdiction in the sense of what is set out in the agreement setting up the board. Jurisdiction as used in the statute we submit, means jurisdiction of such disputes as the various divisions of the Railway Adjustment Board have power to decide. Jurisdiction in the limited sense of scope of the hearing of claims and names of claimant is not the meaning of the statute.

45 U.S.C.A., Section 153, First (p), provides that if a carrier fails to comply with an order of a division of the Adjustment Board, "the Petitioner, or any person for whose benefit such order was made," may file suit to enforce such award. There can be no dispute these plaintiffs were persons, for whose benefit such order was made. This is the holding in *Kirby v. Pennsylvania Railroad Company*, 188 F. 2d 793 (3rd Cir. 1951). In a like situation where the thirty-nine plaintiffs were employed by Pennsylvania Railroad Com-

pany as truckers at its Philadelphia freight station. On or about March 15, 1945, Plaintiffs' positions were abolished, by the railroad company in violation of a contract between the company and the Brotherhood of Railway Clerks. The Brotherhood submitted claims to the Railroad Adjustment Board for reinstatement and back pay for four named employees, none of whom were plaintiffs in the suit, "and others whose positions as truckers, Philadelphia Transfer * * * were abolished effective March 13, 1946". After a hearing the Board issued an order sustaining the claim. The railroad company refused to comply with the order and Plaintiffs sought enforcement in court. Plaintiffs, though not parties before the Board, sought relief as "others adversely affected". The award and order directed reinstatement of "those listed and others adversely affected". In reversing the Trial Court's refusal to enforce the order, the Court of Appeals held that the award was not limited to the four named employees. The court took note of the award of an informally conducted body pointing out that Congress had provided for submission of certain railway labor disputes "to a body which over the years has established its own method of operation in a way which gives each side a chance to have its problems heard and decided by persons who are thoroughly familiar with the industry and the kind of questions presented". The Railway Adjustment Board is a non-lawyers tribunal. It is not bound by the strict rules of common law evidence. These boards know the industry language, practice and customs. In this case the special board decided what was before it, on the basis of industry practice and custom.

The *Kirby* case cited supra was followed in *Powell v. Pennsylvania Railroad Company*, 166 F. Supp. 448 (E.D. Penn. 1958) the court quoting this language from *Kirby*:

> "The statute provides for enforcement of a board order not only at the suit of Petitioner before the Board, but by any person for whose benefit such award was made".

Union Railroad Company v. National Railroad Adjustment Board, 4th Div., 170 F. Supp. 281 (N.D. Ill. 1958); *Railway Express Agency, Inc. v. O.R.T.*, 137 F. 2d 46 (5th Cir. 1943), we think are likewise in point.

Under the above cases the Trial Court and Court of Appeals' decision is erroneous.

4. THE WRIT SHOULD BE GRANTED BECAUSE

The lower court's decision that this case was governed by 45 U.S.C.A., Section 153; First, (p) ignored that further provision of Paragraph (p) providing that on the trial of such suit the findings and order of the Division of the Adjustment Board shall be conclusive on the parties, and such courts' holding rejecting the decision of the arbitrators failed to follow the decisions of this court holding such an award to be final.

This court, even before the statute was amended in 1966 (Public Law 89-456, 80 Statutes 208) recognized that Congress intended that such awards should be final and that a dispute such as this was a minor grievance to be finally decided by the Railroad Adjustment Board: *Gunther v. San Diego-Arizona Eastern Ry. Co.*, 382 U.S. 257, 86 S. Ct. 368, 15 L. Ed. 2d 308 (1965); *B. of R. T. v. Chicago River*

& *Indiana R.R. Co.*, 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957); *U.P. R. R. v. Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959).

The limited scope of review after *Gunther* was further narrowed by the 1966 amendment. *B. of R. T. v. Central of Georgia Railway Company*, 415 F. 2d 403 (5th Cir. 1969); *Hanson v. The C. & O. Railway Co.*, 412 F. 2d 631 (4th Cir. 1969); *Northwest Airlines, Inc. v. Air Line Pilots Association International*, 373 F. 2d 136 (8th Cir. 1967); *B. of R. T. v. D. & R.G. Western Railroad Company*, 370 F. 2d 833 (10th Cir. 1967) Cert. denied 386 U.S. 1018, 87 S. Ct. 1375, 18 L. Ed. 2d 456 (1967).

The lower courts were in error in rejecting the arbitrators' decision in this case, and such award should be given that finality Congress intended.

CONCLUSION

Under the record in this case Petitioner was deprived of the opportunity to offer proof as to the intention of the parties when they created the special law board and therefore the action of the Trial Court in granting summary judgment was error.

The Court was also in error in holding that the Board exceeded its jurisdiction in making an award in favor of Petitioner for all time claims in dispute because an award was final and binding upon the parties and was not a proper subject of review.

The writ should be granted because the importance of the question can not be minimized. The effect of the lower courts holding is to open the door for the railroad industry to challenge awards not only of public law boards but of awards of the National Railway Adjustment Board, impairing their function as compulsory arbitrators, or a complete and final means of settling minor disputes in the railroad industry.

PRAYER

Wherefore, Petitioner prays that a Writ of Certiorari be granted to review the judgment of the 6th Circuit Court of Appeals affirming the judgment of the Trial Court.

Russell M. Baker

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Attorney for Petitioner.

CERTIFICATE OF SERVICE

I, Russell M. Baker, Attorney for the Petitioner, hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, has been furnished to Honorable Ferdinand Powell, Jr., 2101 North Roan Street, P. O. Box 3217, C.R.S., Johnson City, Tennessee 37601, Attorneys for Respondent, by placing same in the United States Mail, postage prepaid, properly addressed, air mail, certified mail, return receipt requested, this the 17th day of June, 1970.

Russell M. Baker

Russell M. Baker

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
NORTHEASTERN DIVISION

CIVIL ACTION
NO. 2290

SWITCHMEN'S UNION OF NORTH AMERICA,
Plaintiff and defendant-by-counterclaim,

v.

CLINCHFIELD RAILROAD COMPANY,
Defendant and plaintiff-by-counterclaim.

MEMORANDUM OPINION AND ORDER

This action was set for pretrial conference on February 17, 1969. On February 10, 1969, the defendant and plaintiff-by-counterclaim moved for a summary judgment, Rule 56 (b), Federal Rules of Civil Procedure. At the pretrial conference, adjourned to April 3, 1969, the Court was uncertain of its jurisdiction and declined to proceed further with either the pretrial conference or the case as a whole until the jurisdictional question is determined.

The parties hereto mutually agreed on August 22, 1967 to the establishment of a special board of adjustment to resolve certain disputes otherwise referable to the National Railroad Adjustment Board and ceded jurisdiction to the special board of the docket which was attached to the agreement submitted to it under the agreement to establish such board, arising out of the interpretation of agreements then in effect between the parties. 45 U. S. C. § 153, second. The docket of claims attached to the agreement listed six members of the plaintiff and defendant-by-counterclaim (trade union), who were claiming pay on account of yardmen of the carrier's handling aprons at the piggyback track in Kingsport, Tennessee in alleged violation of the parties' agreement governing the regular duties of switchmen.

This special board of adjustment, known as public law board No. 92, made its award on March 1, 1968. The award sustained the claims. The statement of the claim preceding the findings therein was: [" * * * claim is being made for one day's pay at pro-rata rate, for Switchman H. Martin, January 13, 1967, and all other claimants and dates of record, account of Switchmen performing other than their regular duties, i.e., lifting and placing Steel Aprons (runways) on Piggyback Cars, on Piggyback Track, Kingsport, Tennessee."] It is undisputed that the carrier paid the six switchmen listed on the aforementioned docket for all the days which were also listed thereupon prior to the commencement of this action.

The plaintiff and defendant-by-counterclaim urges that the aforementioned award directed the defendant and plaintiff-by-counterclaim "* * * to pay H. T. Martin one day's pay, i.e., $26.87, and said award covered all time claims of dates of record and all other claimants as of the date of the award and claimants for whom time claims had been filed were those employees for whose benefit this suit is brought. * * *" The plaintiff seeks to invoke the jurisdiction of this Court herein "* * * under and by virtue of Public Law 89-456; 45 U. S. C. 153, § 3,* as amended June 20, 1966."

Public Law 89-456, §§ 1, 2, 80 Stat., 208, 209, served to amend on June 20, 1966, 45 U.S. C. § 153, first, subsections (m) and (o) - (x), inclusive, and 45 U.S.C. § 153, second. Under these amendments, compliance with the awards of special adjustment boards are enforcible "* * * by proceedings in the United States district courts in the same manner and subject to the same proceedings for enforcement of compliance with awards of the Adjustment Board. * * *" 45 U. S. C. § 153, second.

> "* * * If a carrier does not *comply with* an order of a division of the Adjustment Board *within the time limit in such order*, the petitioner, or any person for whose benefit such order was made, may file in the District

* This reference should have been to Railway Labor Act, § 3, as 45 U.S.C. § 153 had no § 3.

Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as all other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, *by writ of mandamus or otherwise*, as may be appropriate *to enforce or set aside the order* of the division of the Adjustment Board: *Provided*, however, That *such order may not be set aside except* for failure of the division to comply with the requirements of this chapter, *for failure of the order to* conform, or *confine itself, to matters within the scope of the division's jurisdiction*, or for fraud or corruption by a member of the division making the order." 45 U.S.C. § 153, (p). [Italics for emphasis.]

"* * * The major objective of the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151-188 (1958 ed.), was 'the avoidance of industrial strife, by conference between the authorized representatives of employer and employee.' * * *" *Railway Clerks v. Non-Contract Employees* (1965), 380 U.S. 650, 658, 85 S. Ct. 1192, 14 L. Ed. (2d) 133, 139 [1]. That objective may be effectuated only if the means chosen by the parties for settlement of their differences is given full play. *Cf. United Steelworkers v. American*

Mfg. Co. (1960), 363 U. S. 564, 566, 80 S. Ct. 1343, 4 L. Ed. (2d) 1403, 1406 (headnote 1). " * * * Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the act indicate. * * * " *Switchmen's Union of N. A. v. Nat. Mediation Board* (1943), 320 U.S. 297, 302, 64 S. Ct. 95, 88 L. Ed. 61, 65 (headnote 5). The Railway Labor Act " * * * should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress. * * * " *Brotherhood of R. T. v. Chicago, R. & I. R. Co.* (1957), 353 U.S. 30, 35, 77 S. Ct. 635, 1 L. Ed. (2d) 622, 626 (headnote 4).

It is clear and unambiguous that the Congress intended that carriers and its employees, through their unions or otherwise, should be encouraged to avoid industrial strife by setting up special boards of adjustment to determine disputed claims arising from the interpretation of collective bargaining agreements then in effect between the carrier and union; that such special boards' jurisdiction was to be limited to the jurisdiction conferred thereupon by agreement of the carrier and union; that compliance with the awards of these special boards should be enforced in United States district courts in the same manner and subject to the same proceedings for enforcement of compliance therewith as had earlier been provided for enforcement of compliance with awards of the National Railroad Adjustment Board; and that the right of action to enforce such compliance should accrue on the date fixed by the special boards as " * * * the time limit * * *" for such compliance, 45 U.S.C. § 153, first, (p).

Apparently through an inadvertence, public law board no. 92 neglected to include in its order a time limit within which the carrier must have complied therewith. "* * * [T]he Act says the order of the Board shall fix that limit (when compliance shall be had], and that is a part of the judgment that the court scrutinizes. * * * " *System Federation No. 8, etc. v. Missouri - K. - T. R. Co.*, D. C., Tex. (1941), 40 F. Supp. 803, 805 [2]. Yet, " * * * courts are invested with sufficient appellate jurisdiction over the Board to protect [members of the plaintiff-union and defendant-by-coun-

terclaim] from a denial of due process." *Ferro v. Railway Express Agency, Inc.*, C. A. 2d (1961), 296 F. 847, 852-853. It is the opinion of this Court, and so found and concluded, that public law board no. 92 denied the plaintiff's claimant-members their constitutional right to due process of law by failing to fix in its award a compliance date and, consequently, an accrual time for their right to seek enforcement of the board's order in this action. *Cf. Hornsby v. Dobard*, C. A. 5th (1961), 291 F. (2d) 483, 487 [3]; *Barnett v. Pennsylvania-Reading Seashore Lines*, C. A. 3rd (1957), 245 F. (2d) 579, 581 [1, 2].

Since the award is incomplete to this extent, the question follows as to whether this Court should consider its jurisdiction invoked sufficiently by the compliance with the award of the board by the carrier's paying the amounts evidently due the persons listed for the days listed on the aforementioned docket, and thereby, perhaps rendering the failure of inclusion of a compliance date in the award moot; or whether to set aside the board's award for failure of the board to comply with 45 U.S.C. § 153, first, (p). The Court believes that under the circumstances it should assume jurisdiction.

To dismiss this proceeding now for want of jurisdiction without prejudice to further hearing before the board is considered unduly rigid. This would multiply and complicate litigation when most courts have more of it than can be adjudicated properly, and when the prime concern should be simplification. The procedures under the Railway Labor Act are obviously designed for informality and dispatch. Court costs and attorney's fees in proceedings to enforce compliance with awards thereunder burden the minimal appropriations the Congress provides to operate the federal courts and ought to be minimized. A dismissal might create new problems of res adjudicata, collateral estoppel, etc. "* * * The language of § 153, first, (p) is broad and flexible enough for a District Court to mold * * * flexible and sensible procedures. * * * " *Hodges v. Atlantic Coast Line Railroad Company*, C. A. 5th (1962), 310 F. (2d) 438, 445 [8].

Where the employer and its employees have chosen a special adjustment board as their instrument for the definitive settlement of claims under their collective bargaining agreement, and a dispute arises involving an interpretation of the award; it is not open to the courts to reweigh the merits of the claims. *Cf. Drivers Union v. Riss & Co.* (1963), 372 U.S. 517, 519, 83 S. Ct. 789, 9 L. Ed. (2d) 918, 920 (headnote 3). There is a provision in the Railway Labor Act that, in case a dispute arises involving an interpretation of an award, the division of the National Railroad Adjustment Board upon request of either party shall interpret the award in the light of the dispute. 45 U.S.C. § 153, first, (m). Prior to the 1966 amendments, aforementioned, district courts could not remand cases to that Board. *T. C. E. Union v. Union Pacific R. Co.* (1966), 385 U.S. 157, 166, 87 S. Ct. 369, 17 L. Ed. (2d) 264, 271, n. 4 [7]; rehearing denied (1967), 385 U.S. 1032, 87 S. Ct. 737, 17 L. Ed. (2d) 680.

The defendant and plaintiff-by-counterclaim maintains that it has fully complied with the award of Public Law Board No. 92 by paying the proper amounts of money to the six claimants on all the claims it conceded jurisdiction to that board to adjudicate, and that no enforcement of further compliance is required by the award. The plaintiff and defendant-by-counterclaim maintains that the carrier has not fully complied with the board's award, and that it is entitled to enforcement of the award as to 20 more of its members and as to additional days for the six of its members who have been partially compensated. The purport of the award of the board is not only disputed by these parties, it is hardly a paragon of clarity for the Court.

If this Court were empowered to remand this proceeding to public law board no. 92, that body could doubtless with its experience and common sense, handle this entire dispute in a satisfactory manner in a single proceeding. *Ibid.*, 385 U.S. at 165, 17 L. Ed. (2d) at 270 [6]. Unfortunately, the Congress did not include as a part of these same amendments an applicability of 45 U.S.C. § 153, first, (m)

to 45 U.S.C. § 153, second, authorizing special adjustment boards. So, this Court has no apparent authority to remand this proceeding to public law board no. 92 for clarification.

The defendant and plaintiff-by-counterclaim has interposed a motion for a summary judgment with supporting affidavits. Rule 56 (b), Federal Rules of Civil Procedure. The plaintiff and defendant-by-counterclaim has served opposing affidavits. Rule 56 (c), Federal Rules of Civil Procedure. The judgment sought must be rendered forthwith if the pleadings, admissions on file, and affidavits show that there is no genuine issue as to any material fact, and that the defendant and plaintiff-by-counterclaim is entitled to a judgment as a matter of law. *Idem.*

This Court does not attempt to interpret the award of public law board no. 92. " * * * Its members understand railroad problems and speak the railroad jargon. * * * " *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U.S. 239, 243, 70 S. Ct. 577, 94 L. Ed. 795, 800. The Court, for example, is confused by the carrier's paying six claimants, when only one is specifically named in the award. These are results railroad persons understand inherently and Courts do not. This Court is empowered, however, 45 U.S.C. § 153, second; *ibid.*, first, (p), to determine whether to set aside the special adjustment board's award for: (a) its failure to comply with the requirements of title 45, chapter 8, U.S.C., (b) for failure of the award to conform, or confine itself, to matters within the scope of the jurisdiction ceded to it by the agreement of the parties, or (c) for fraud or corruption by a member of the board making the award.

As to (a) and (c), *supra*, the Court finds and concludes that there is no reason whatever to set aside the award. As to (b), *supra*, the Court finds and concludes that except that they failed to include in their award a certain date for compliance therewith, the board members complied with the essential terms of the agreement of these parties on which their jurisdiction was grounded, and having done so, any award to any claimants or for any days not included on the docket designated as attachment "A" to such agreement

would have constituted a failure to conform or confine the award to matters within the scope of the jurisdiction ceded by such agreement, rendering public board no. 92 a body *functus officio*. See *Brotherhood of R. and S. Cl., etc. v. Norfolk So. Ry. Co.*, C. A. 4th (1944), 143 F. (2d) 1015, 1018 [7]; cf. *United Steelworkers v. Enterprise* Corp. (1960), 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. (2d) 1424, 1428 [4].

Accordingly, the motion of the defendant and plaintiff-by-counterclaim for a summary judgment hereby is SUSTAINED. The remaining issues herein are rendered MOOT. Summary judgment will enter for the defendant and plaintiff-by-counterclaim Clinchfield Railroad Company, dismissing the complaint of the plaintiff and defendant-by-counterclaim Switchmen's Union of North America. Rule 58, Federal Rules of Civil Procedure.

Nothing hereinabove, however, shall be construed to defeat the plaintiff's right to allowance of a reasonable fee for its attorney, to be taxed and collected as a part of the costs of this suit, should the plaintiff finally prevail. Costs hereof shall be paid out of the appropriation for the expenses of the courts of the United States, 45 U.S.C. § 153, first, (p).

ENTER:

C. G. NEESE

United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

CIVIL ACTION
NO. 2290
JUDGEMENT

SWITCHMEN'S UNION OF NORTH AMERICA,

v.

CLINCHFIELD RAILROAD COMPANY,

This action came on for (hearing) before the Court, Honorable C. G. Neese , United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the motion of the defendant and plaintiff-by-counterclaim for a summary judgment is sustained, and the remaining issues are rendered moot; summary judgment will enter for the defendant and plaintiff-by-counterclaim Clinchfield Railroad Company, dismissing the complaint of the plaintiff and defendant-by-counterclaim Switchmen's Union of North America, in accordance with a memorandum opinion and order of the Court filed and entered this day.

Dated at Greeneville, Tennessee, this 7th day of May, 1969.

/s/ KARL D. SAULPAW, JR.
Clerk of Court

By /s/ PATSY STANBERG
Deputy Clerk

APPENDIX A

No. 19,691

Filed
Mar. 4, 1970
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION UNION,
Plaintiff-Appellant,

v.

CLINCHFIELD RAILROAD COMPANY,
Defendant-Appellee.

PER CURIAM ORDER

Before: CELEBREZZE and BROOKS, Circuit Judges, and McALLISTER, Senior Circuit Judge

The principal issue in this case is whether, under the Railway Labor Act, a special board of adjustment established by the parties to resolve certain disputes between the carrier and the union can render a valid award as to claims not set forth in the agreement.

Title 45 U.S.C. Section 153 Second, provides that "The cases which may be considered by (a special board of adjustment) shall be defined in the agreement establishing it.

* * * " Since the agreement establishing the special board provided that it was formed "for the purpose of disposing of time claims which are listed in the docket appended (thereto) as Attachment 'A'" and the appended docket contained only a list of names of six members of the union who were asserting time claims, the District Court properly concluded that only the six claims specified in the agreement could be considered.

Affirmed.

Entered by order of the Court

CARL W. REUSS
Clerk

A-12

No. 19,691

Filed
Mar. 24, 1970
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION UNION,
Plaintiff-Appellant,

v.

CLINCHFIELD RAILROAD COMPANY,
Defendant-Appellee.

ORDER

The motion for rehearing filed by the Plaintiff-Appellant, United Transportation Union, has been considered and it is denied.

Entered by order of the Court

CARL W. REUSS
Clerk

APPENDIX "B"

STATUTE INVOLVED

Section 3 of Railway Labor Act, as amended (Title 45 U.S.C.A. Section 153 [as amended June 20, 1966, Pub. L. 89-456, Sections 1, 2, 80 Stat. 208, 209])

Section 153. National Railroad Adjustment Board — Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

First. * * *

(o) In case of an award by any division of the Adjustment Board in favor of Petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the Petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the Petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the Petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and

such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: PROVIDED, HOWEVER, that such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States District Court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The

judgment of the court shall be subject to review as provided in Sections 1291 and 1254 of Title 28.

* * * * *

Second. * * *

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a Special Board of Adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the Special Board may request the Mediation Board to designate a member of the Special Board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the Special Board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a

neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or groups of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the Petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States District Courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

45 U.S.C.A. Section 153, Railway Labor, Ch. 8:

"(h) The said adjustment board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First Division: To have jurisdiction over disputes involving train and yard-service employees of carriers, that is,

engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second Division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second, and Third Divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

28 U.S.C.A. Section 1337. Commerce and Anti-Trust Regulations:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress.

regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931.

Rule 56(c), Federal Rules of Civil Procedure:

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 56(e), Federal Rules of Civil Procedure:

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, Eff. July 1, 1963."

C-1

PUBLIC LAW BOARD #92
AWARD #1

PARTIES TO DISPUTE

SWITCHMEN'S UNION OF NORTH AMERICA
CLINCHFIELD RAILROAD COMPANY

STATEMENT OF CLAIM

Claim is being made for one day's pay at pro-rata rate, for Switchman H. Martin, January 13, 1967, and all other claimants and dates of record, account of Switchmen performing other than their regular duties, in lifting and placing Steel Aprons (runways) on Piggyback Cars, on Piggyback Track, Kingsport, Tennessee.

Findings:

This Public Law Board, established pursuant to the Railway Labor Act of the United States Congress, upon the whole record, and all the evidence, finds that the parties herein are respectively carrier and employee within the meaning of said act and that the board has jurisdiction.

The dispute, as submitted, involves several minor issues and a major issue. Claims were presented subsequent to April 29, 1966, and discussed on the property relative to the lifting of aprons on Piggyback cars, Kingsport Yard. The carrier's position was that such claims only could be for a carman's day, while the organization made claim for a yard day. The instant claim of January 13th, 1967, of H. Martin is supported by a time slip reading: "A day's pay," without specifying, or using language of a yard day, or carman's day. The organization processed the claims in all instances for a yard day and the carrier responded classifying the claims as for a carman's day. The claim is for service performed, and within the prerogative of the organization to classify and correct minor irregularities of initial submission, at general chairman level on the property. Thus the claim must be here construed as for a yard day.

The introduction of Piggyback Cars brought several new duties not heretofore performed by the various crafts, but duties of a similar nature to duties of long standing. One of these is the duty of raising aprons on Piggyback Cars about to be switched. On this carrier, in this yard, such work had been given to carmen, when carmen were on duty, and had not heretofore been performed by switchmen. Under such circumstances the work should not be transferred to claimants by a reduction of carmen forces, and the claims must be sustained.

The question of the time limits rule has been raised. Article 23 of the contract has never been interpreted on this property. Article 23 is a standard article found in many contracts of various organizations on numerous properties. Article 23 reads:

"*Article 23*—*Time Limit on Claims.*

All claims or grievances arising on and after November 1, 1948, shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within sixty (60) days from the date same is filed, notify the employee or his representative of the reasons for such disallowance. If not so notified, the claim or grievance shall be considered valid and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of the carrier shall be notified of the rejection of his decision. Failing to comply with this provision the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the

contentions of the employees as to other similar claims or grievances."

The section in question is that part of 23(b) reading: "and the representative of the carrier shall be notified of the rejection of his decision."

Here written appeal was made to the highest officer within the sixty-day time limit, but it is contended that compliance was not had with the quoted section above in that the proper notice was not given to the representative of the rejection of his decision. The appeal having been made within the sixty-day limitation, and all carrier officers having been fully aware of the appeal, there can be no fatal procedural error. It should be noted that all officers concerned, of this carrier on this property, the personnel officer, the superintendent, and the trainmaster, are housed in the same building. It should further be noted that the rule provides no method of notification, nor is it clear what carrier officer is to be notified, or if such notification, if separate from the appeal, must be within the sixty-day time limit. Under the circumstances, the most that could be claimed from such a defect, is an element of surprise and a demand for extension of time limits.

Award: Claims sustained as per findings.

Dated: Erwin, Tennessee
March 1st, 1968

/s/ ARTHTUR W. SEMPLINER,

Arthur W. Sempliner
Chairman and Neutral

/s/ L. R. BEALS,

L. R. Beals
Carrier Member

/s/ GEORGE CLARK,

George Clark
Organization Member

AGREEMENT BETWEEN CLINCHFIELD RAILROAD COMPANY AND ITS EMPLOYEES REPRESENTED BY SWITCHMEN'S UNION OF NORTH AMERICA

For the purpose of disposing of time claims which are listed in the docket appended hereto as Attachment "A", it is agreed:

(a) There shall be established a special board of adjustment under the provisions of the amended Railway Labor Act, pursuant to Public Law 89-456, which shall hereafter be referred to as the Board. Such Board shall have jurisdiction of the docket attached hereto, submitted to it under this agreement and arising out of the interpretation of agreements currently in effect between the parties hereto.

(b) The Board shall consist of three members. The carrier member will be Mr. L. R. Beals, Personnel Officer and Assistant to General Manager. The organization member will be Mr. P. K. Elliott, General Chairman. The third and neutral member shall be Mr. Arthur W. Sempliner.

(c) The Board shall meet at Erwin, Tennessee, at a mutually agreeable date and shall establish the rules of procedure by which it shall be governed and, therefore, the Board shall meet at mutually agreed times until the docket submitted is disposed of. The Board shall have the authority to employ a secretary and incur such other expenses as is necessary for the proper conduct of its business.

(d) The compensation and expenses of the carrier member shall be borne by the carrier. The compensation and expenses of the organization member shall be borne by the organization. The compensation and expenses of the neutral member shall be set and paid by the National Mediation Board. All other expenses of the Board shall be borne 50% by the carrier and 50% by the organization.

(e) The parties may present, either orally or in writing, statements of facts, supporting evidence, and or data and argument of their position with respect to the claims con-

sidered by the Board. The Board shall have authority to require the production of such additional evidence, either oral or written, as it may desire from either party, with the exception of contracts between carriers or correspondence between either party and its principals.

(f) The Board shall make findings and render an award in the claims submitted to it, which findings and awards shall be in writing, with a copy furnished the parties to this agreement. Such awards shall be final and binding upon both parties. A majority of the Board shall be competent to render an award.

CLINCHFIELD RAILROAD COMPANY

By L. R. BEALS

Personnel Officer and
Assistant to General Manager

SWITCHMEN'S UNION OF NORTH AMERICA

By P. K. ELLIOTT

General Chairman

APPROVED:

GEO. CLARK

International Vice-President

Erwin, Tennessee
August 22, 1967.

ATTACHMENT "A"

DOCKET OF CLAIMS

Claims involved in this dispute are outlined as follows:

Claim of:	H. T. Martin	1-12-67
		1-18-67
		1-19-67
		1-20-67
		1-23-67
		1-24-67
		1-30-67
		1-31-67
	L. W. Brown	1-17-67
		1-18-67
		1-24-67
	W. A. Callahan	1-17-67
		1-18-67
		1-24-67
	S. W. Pilkington	1-13-67
		1-18-67
		1-19-67
		1-20-67
		1-23-67
		1-24-67
		1-30-67
		1-31-67
	D. H. Mc[illegible]	1-17-67
		1-18-67
		1-24-67
	C. A. Cowden	1-20-67

Account Yardmen handling aprons at piggyback track, Kingsport, Tennessee, in alleged violation of agreement.

EXHIBIT "A"

STATE OF TEXAS)
COUNTY OF DALLAS)

My name is George Clark. On August 22, 1967 and for a long time prior thereto I was Vice-President of the Switchmen's Union of North America. I continued to occupy this position until this organization was merged into the United Transportation Union on January 1, 1969. Prior to August 22, 1967 I had been assisting in the handling of time claims filed by employees of our organization with the Clinchfield Railroad Company growing out of switchmen being required to perform work other than their regular duties, i.e., lifting and placing steel aprons (runways) on piggyback cars on piggyback tracks at Kingsport, Tennessee. I am familiar with the facts and circumstances leading up to the establishment of Public Law Board No. 92 to adjudicate claims which had been filed with the Clinchfield Railroad Company.

On August 22, 1967 Mr. P. K. Elliott, General Chairman of Switchmen's Union of North America, and I met with L. R. Beals of the Clinchfield Railroad Company in Erwin, Tennessee. At that meeting we discussed the claims that had been presented and likewise discussed the establishment of a Public Law Board to decide the dispute.

At this conference we had some of the time claims that had been submitted by our organization and rejected by the railroad. As I recall it, we had only a few of the time claims with us inasmuch as all of the time claims involved the same principle. The claims which had been filed were considerable in number and were voluminous. I did not consider it necessary that we discuss or list each and every claim which had been submitted to the railroad because of the time which would be consumed in doing so and because each claim involved the same violation of the contract. We were discussing a principle which involved, we claimed, a continuing violation of the contract. During this conference we did discuss with Mr. Beals Article 23 of the

Agreement between the railroad and Switchmen's Union of North America. This is a time limitation rule, and it was the contention of the carrier that certain claims were barred because of the time limit provision, and this was a point in constant dispute as we, representing the Switchmen's Union, did not agree that the claims were barred. We did withdraw some claims which did not bear dates or names, but I did not agree, as Mr. Beals states that it would be useless to submit such claims to a Public Law Board because they were barred by the six months limitation rule, nor did I tell Mr. Beals' secretary not to list any claims prior to February 22, 1967 or any that were not finally declined between September 5, 1966 and February 22, 1967. During this conference both Mr. Elliott and I expressed reasons to support our position and we took the same position when the cases were presented before the Special Board of Adjustment. Mr. Beals, acting for the railroad, contended the claims were barred by the contract, and he maintained this position before the Special Board of Adjustments, i.e., that the claims were barred by reason of the time limit rule. As I recall it, Mr. Elliott showed Mr. Beals some of the claims which had been filed which were only representative of like and similar claims growing out of the same contract violation and which had been declined by the railroad.

I emphatically state that I never instructed or suggested to anyone during this conference that Mr. Elliott and I would agree to delete certain claims because of the time limit provision or for any other reason. In the twenty-five years that I have been handling such railroad grievance matters it has never been the practice to list or itemize each and every time claim because of the voluminous work involved and because it has always been the practice to take a claim or claims and use them as a pattern case for claims of a similar nature, and once a dispute concerning a claim is decided and a principle is established, it is used for the settlement of all claims of a similar nature. Mr. Beals must have known from our discussion that not only were the claims listed on Attachment "A" in controversy, but he must have known that other claims which he had declined

and returned to Mr. Elliott were in controversy. It would be foolish to set up a Public Law Board to decide only a few claims as listed in Attachment "A". The matter of expense would prohibit this. The violation of this contract by the railroad was a continuing thing, and there would be no purpose in going to the expense of setting up a Board to decide only a few claims when other violations were occurring daily. The purpose of establishing the Board was to decide the dispute so that the recurring claims could be disposed of based upon the Board's decision.

Mr. Beals did dictate certain language to be included in the Agreement establishing the Board, and we listed certain claimants in Attachment "A" without listing all of the claimants and their claims which were a matter of record in correspondence between our organization and the railroad. Attachment "A" was confined to the listed claimants merely to expedite the drafting of the Agreement establishing the Board, and it was known to all of the parties that there were numerous claims of identical nature in addition to those listed in Attachment "A". Mr. Beals did know that there were other disputed time claims other than those listed in Attachment "A", and he likewise knew that there was a continuing dispute occurring almost daily over the railroad's practice, and this matter had been discussed with the trainmaster, superintendent, and Mr. Beals.

If Mr. Beals, at our conference on August 22, 1967, had stated or claimed that the only claims which the Public Law Board could decide were those listed in Attachment "A" we would not have signed the Agreement setting up the Board because of the daily recurring violations.

I do recall that we told Mr. Beals that we were withdrawing claims which had no dates or names, and Miss Pratt may have been there at that time, and she may have been confused as to which claims were being withdrawn, but I never at any time told her not to list the claims referred to in the letter of July 31, 1967, addressed to Mr. Elliott, marked Appendix "B" attached to Defendant's Motion for Summary Judgment.

I believe the Board met on February 29, 1968 at about 10:00 o'clock A.M. The Board was furnished briefs by both the carrier and the Switchmen's Union. If I recall correctly, we adjourned until about 1:30 P.M. so that each side could study the opposition's brief before the hearing started. When we reconvened Mr. Beals did orally object to a consideration of claims other than those listed in Attachment "A". This is the first time he had stated to me or to Mr. Elliott so far as I know that the hearing was to be limited to the named claims. As the award shows, the Board did not agree with Mr. Beals' claim.

The carrier's position at the hearing is set forth in Exhibit "B" attached hereto. The Board's award marked Exhibit "C" attached hereto shows that the Union was claiming one day's pay for Switchman, H. Martin, January 13, 1967, and all other claimants and dates of record.

s/ GEORGE CLARK

George Clark

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared George Clark, who, being first duly sworn upon oath, stated to me that he is authorized to make the above and foregoing Affidavit and that the matters and facts set forth therein are within his personal knowledge and that they are true and correct.

Given under my hand and seal of office this day of February, 1969.

s/ MICHAEL H. O'BRIEN

Notary Public in and for
Dallas County, Texas

EXHIBIT "B"

STATE OF TENNESSEE
COUNTY OF UNICOI

Before me, the undersigned authority, on this day personally appeared P. K. ELLIOTT who, having been by me first duly sworn, deposes and says:

My name is P. K. ELLIOTT. I was General Chairman for the Switchmen's Union of North America on the Clinchfield Railroad at the time the controversy arose between the Union and that Railroad growing out of time claims filed by our organization with the Railroad Company because of switchmen being required to perform work other than their regular duties, i.e., lifting and placing steel aprons (runways) on piggyback cars on piggyback tracks at Kingsport, Tennessee, and I am familiar with the facts and circumstances leading up to the establishment of Public Law Board No. 92 which was convened to decide claims referred to above.

On August 22, 1967, Mr. George Clark, Vice President of the Switchmen's Union of North America and I met with Mr. L. R. Beals of the Clinchfield Railroad Company at its office at Erwin, Tennessee. I had been filing the claims on behalf of our members growing out of the dispute referred to above. At the time of our meeting, our members were being required to do the work which we claimed was a carman's duties and which we claim was in violation of the Union's contract with the Railroad. This had been going on for many months and was a continuing thing. This matter had been the subject of correspondence between me and the Railroad and had been the subject of conversation with the railroad trainmasters, superintendent, and Mr. Beals. At the meeting on August 22, 1967, we discussed the claims that had been filed with the Railroad and although I did not have all of the claims with me, I did have a number of claims. But our discussion revolved around the whole problem and the continuing violation and not just the claims listed in Attachment "A" of the agreement setting up the Board.

At this conference, I had with me a number of time claims that had been submitted by our organization and rejected by the Railroad. During this conference, a discussion was had with Mr. Beals concerning Article 23 of the Union contract and particularly the rule concerning time limitations and it was Mr. Beal's contention that certain claims were barred because of the time limit provision of Article 23 of the contract and this was a point about which we could not agree. I withdrew some claims which did not bear dates or names but I did not state nor did I agree nor did I hear Mr. Clark state, nor did I hear him agree that it would be useless to submit such claims to a Public Law Board because they were barred by six months limitation as contended by the railroad. The position that Mr. Clark and I took with Mr. Beals with reference to the claims being barred is the same position we took when the cases were presented to the Special Board of Adjustment. Mr. Beals likewise took the same position before the Board that he had taken during our discussion of the matter with him, to-wit, that the claims were barred by reason of the time limit rule. I never did agree nor did I hear Mr. Clark agree in our conversation with Mr. Beals that the Union would delete certain claims because they were barred.

The claims set out in Attachment "A" of the agreement setting up the Board are simply samples of many other claims we were making for continued violation of the contract. There would be no point in creating a Special Board to hear only the few claims listed in Attachment "A" and if the decision of the Board on these claims was not to be used as a pattern to settle all similar claims we would have been compelled to negotiate the other claims with the Railroad and failing to agree, set up another Special Board of Adjustment.

In my mind, Mr. Beals knew that not only were the claims listed in Attachment "A" in dispute, but in my opinion he knew that we were making claim before the Special Board for time claims which he had declined and returned to me. My reason in agreeing to the establishment of the Board was for the purpose of deciding the principle

in dispute so that all like and similar claims could be resolved. If Mr. Beals had made known to us at our conference of August 8, 1967, and earlier conferences when we first discussed the establishment of a Board, that the only claims which the Railroad Company was agreeing for the Public Law Board to decide were those listed in Attachment "A", we would not have agreed to set up the Board. It would have been useless, expensive, a waste of time and effort to go to the expense of setting up a Special Board that did not have power to settle the whole controversy but only pass on a few time claims.

On February 29, 1968, when the Board convened at about 10:30 o'clock A.M., I furnished a copy of my brief to Mr. Beals and he furnished me a copy of his brief. After a recess the Board met again, but in the meantime we had studied Mr. Beal's brief setting forth the Carrier's position and at that time we called his attention to some language in his brief which we thought might be construed as limiting the hearing to the claims listed in Attachment "A". He stated he was taking the position the hearing was so limited. This is the first time that he had stated to me or to Mr. George Clark, insofar as I know, that the hearing was to be so limited. In our discussion we made it clear at the hearing that there was no point in deciding only a few cases, that a principle was involved and that the purpose of the hearing was to set a precedent so that all claims arising out of recurring violation could be settled. The Board decided that the Union's position was correct by a majority vote as shown by the award.

/s/ P. K. Elliott

STATE OF TENNESSEE
COUNTY OF UNICOI

Before me, the undersigned authority, a Notary Public in and for Unicoi County, Tennessee, on this day personally appeared P. K. ELLIOTT who being by me first duly sworn upon oath stated to me that he is authorized to make the above and foregoing Affidavit, and that the matters and facts set forth therein are within his personal knowledge and that they are true and correct.

Given under may hand and seal of office this day of February 1969.

s/ MILDRED LONGCRIER 2 18 69

Notary Public in and for
Unicoi County, Tennessee

My commission expires 6th day of May, 1972.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
NORTHEASTERN DIVISION

No. 2290 Civil

SWITCHMEN'S UNION OF NORTH AMERICA
v.
CLINCHFIELD RAILROAD COMPANY

Exhibit A to Motion of Defendant for Summary Judgment

AFFIDAVIT OF L. R. BEALS

STATE OF TENNESSEE)
COUNTY OF UNICOI)

I, L. R. Beals, being first duly sworn, do make solemn oath that my name is L. R. Beals; I reside at Erwin, Tennessee; I am 62 years of age; I am the Personnel Officer and Assistant to the General Manager of the Clinchfield Railroad Company, the Defendant in the above entitled action; I have occupied this position with the Clinchfield Railroad Company for 16 years, and I know of my own personal knowledge the following facts to be true and correct:

On August 22, 1967 in my office in the General Offices of the Clinchfield Railroad Company, at Erwin, Tennessee, I met with Mr. George Clark, who was then an International Vice President of the Switchman's Union of North America, the Plaintiff in the above entitled action, and with Mr. P. K. Elliott, who was then the General Chairman of the Clinchfield Railroad Company of the Switchmen's Union of North America. The purpose of said meeting with Mr. Clark and

Mr. Elliott was to establish a Public Law Board under the provisions of the Railway Labor Act for the purpose of disposing of several time claims which had been presented through regular channels to the Clinchfield Railroad Company and finally denied by me as the officer of final appeal in labor disputes.

At said conference Mr. Clark and Mr. Elliott, representing the Switchmen's Union of North America, had with them and in their possession the time claims that had been filed by the Union and finally rejected by me, along with copies of my letters of rejection.

At said time Article 23 of the agreement between the Switchmen's Union of North America and the Clinchfield Railroad provided a time limitation of 6 months on appealing claims to a tribunal having jurisdiction pursuant to law or agreement from the final decision of the official of the Clinchfield Railroad Company, who was myself.

I told Mr. Clark that a number of the claims were barred by the 6-months rule under Article 23, and it would be useless to submit them to any board on account of this provision of the contract. On the spot he agreed with me immediately and told my secretary, who was going to get up the draft of the agreement and list of claims to be submitted, not to list any claims prior to declinations on February 22, 1967. Mr. Clark in my presence stated to her not to list any claims that were finally declined between September 5, 1966 and February 22, 1967.

At this conference in my office on August 22, 1967 with Mr. Clark and Mr. Elliott, I had some drafts of agreements which, as I recollect, Mr. Clark had sent me prior to the conference, and at the conference Mr. Clark and I discussed what language should go into the agreement establishing the Board and into the docket to be appended as an attachment listing the claims to be heard by the Board, and at the conference I dictated the agreement establishing the Board, and the list of claims to be named in Appendix A, which was attached to and a part of the agreement, was furnished my secretary by Mr. Clark

My secretary wrote up the agreement and the Appendix A in accordance with my dictation and the instructions given her by Mr. Clark and brought the agreement in to the conference, and Mr. Clark, Mr. Elliott and I went over it, and I signed the agreement for the Clinchfield Railroad Company, and Mr. Elliott and Mr. Clark signed the agreement for the Switchmen's Union of North America. At the time we went over this agreement before its being signed and at the time of its being signed the docket was there present as a part of the agreement and attached to it.

The agreement and docket referred to in this affidavit is the same agreement which is attached to the counterclaim of the Defendant, Clinchfield Railroad Company, as Exhibit 1 to the Answer in the above styled case.

At the time of this conference in my office in Erwin on August 22, 1967 with Mr. Clark and Mr. Elliott I did not have personal knowledge of any disputed time claims between the Switchmen's Union of North America and the Clinchfield Railroad except those listed in the docket to the agreement or excluded by Mr. Clark as barred by the 6-months rule, and neither Mr. Clark nor Mr. Elliott called my attention to any other claims, and the agreement signed there at the conference contained in the docket appended to it all of the claims about which I had knowledge that there was any active dispute and were the only claims which I agreed on behalf of the Clinchfield Railroad Company to submit to the decision of the Public Law Board.

Thereafter on February 29, 1968 in the Conference Room of the General Offices of the Clinchfield Railroad Company at Erwin, Tennessee, the Public Law Board created by the agreement of August 22, 1967 met. I was present at this meeting. The members of the Board, consisting of myself, Mr. P. K. Elliott and Mr. Arthur Sempliner, were all present. Mr. George Clark was present as spokesman for the Union. Also in attendance was Mr. R. E. Rice and Mr. W. T. Stultz, officials of the Clinchfield Railroad Company.

At this session of the Public Law Board on February 29, 1967 I was handed a brief in support of the claims or position of the Switchmen's Union in the arbitration controversy in which the position was taken that the arbitration applied to all claimants and dates of record. This is the first time that I knew the Switchmen's Union contended that the Public Law Board created by the agreement was to deal with any claims other than those listed in the agreement establishing the Board. I immediately took exception to the presentation of the Switchmen's Union and specifically called the attention of the neutral, Mr. Sempliner, to the fact that the statement of claims contained in the Switchmen's presentation was contrary to the agreement establishing the Board. I further called attention of the full Board that the carrier's statement of the claim which was made a part of its presentation confined its substance and statement exclusively to the claims covered by the agreement establishing the Public Law Board. At that time I told the whole Board that it had no jurisdiction on any claims not listed in the agreement creating the Board.

At no time did the Clinchfield Railroad Company and Switchmen's Union sign any other agreement enlarging or changing the jurisdiction of the Board as set out in the agreement of August 22, 1967.

/s L. R. BEALS

L. R. Beals

Subscribed and sworn to before me this 5th day of February, 1969.

/s ROBERT F. SAMS

Notary Public

My Commission Expires

C-19

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
NORTHEASTERN DIVISION

No. 2290 Civil

SWITCHMEN'S UNION OF NORTH AMERICA
v.
CLINCHFIELD RAILROAD COMPANY

Exhibit B to Motion of Defendant for Summary Judgment

AFFIDAVIT OF RHEBA PRATT

STATE OF TENNESSEE }
COUNTY OF UNICOI }

I, Rheba Pratt, being first duly sworn, do make solemn oath that my name is Rheba Pratt, I reside at Erwin, Tennessee; I am 58 years old; I am secretary in the Executive Department of the Clinchfield Railroad Company, the Defendant in the above entitled action; I have been employed by the Clinchfield Railroad Company since December, 1930 and in my present position since January 15, 1952; I know of my own personal knowledge the following facts to be true and correct:

On August 22, 1967 in the office of Mr. L. R. Beals, Personnel Officer and Assistant to the General Manager of the Clinchfield Railroad Company at Erwin, Tennessee, I was present with Mr. Beals, Mr. George Clark, International Vice President of the Switchmen's Union of North America, and Mr. P. K. Elliott, General Chairman of the Clinchfield Railroad Company for the Switchmen's Union, when they were negotiating and discussing an agreement for a Public Law Board to arbitrate time claims of the Switchmen's Union. Mr. Beals dictated the agreement for the Board

and the form for the Appendix to be attached to the agreement listing the claimants and claim dates.

Mr. George Clark, who was there present, went over the list of claimants and claim dates of the claims in his posession and told me, in writing up the appendix or docket to the agreement for the Board, not to list any claims which had been denied by Mr. Beals between September 5, 1966 and February 22, 1967.

On a copy of Mr. Beal's letter under date of July 31, 1967 to Mr. P. K. Elliott, I noted these two dates and the words "Do not list, says Mr. Clark" with my initials, which was a memorandum made at the time.

A xerox copy of the letter with the notations on the same is attached to this affidavit marked Appendix 1 and made a part of the same.

I prepared the agreement creating the Board and the docket to be appended according to the instructions I received from Mr. Beals and Mr. Clark.

I have examined a copy of the Answer and Counterclaim of the Defendant Clinchfield Railroad Company filed in the above entitled suit, including the contract for the Public Law Board and docket marked Exhibit 1 to the Answer, and these papers are the ones which I typed from the dictation of Mr. Beals and the instructions of Mr. Clark.

s RHEBA PRATT

Rheba Pratt

Subscribed and sworn to before me this 5th day of February, 1969.

/s/ ROBERT F. SAMS

Notary Public

My commission expires November 5, 1972.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. 2290 Civil

SWITCHMEN'S UNION OF NORTH AMERICA
v.
CLINCHFIELD RAILROAD COMPANY

Exhibit D to Motion of Defendant for Summary Judgment

AFFIDAVIT OF R. E. RICE

STATE OF TENNESSEE
COUNTY OF UNICOI

I, R. E. Rice, being first duly sworn, do make solemn oath that my name is R. E. Rice; I reside at Erwin, Tennessee; I am 50 years old; I am Trainmaster-Road Foreman of Engines at Erwin, Tennessee for the Clinchfield Railroad Company, the Defendant in the above entitled action; I have been employed by the Clinchfield Railroad Company since August 21, 1949, and I know of my own personal knowledge the following facts to be true and correct:

On February 29, 1968 at the Conference Room in the General Offices of the Clinchfield Railroad Company at Erwin, Tennessee I was present at a meeting or session of the Public Law Board considering certain time claims arising out of piggyback operations at Kingsport. The members of the Board were Mr. L. R. Beals, Mr. P. K. Elliott and Mr. Arthur W. Sempliner, all of whom were present. Mr. George Clark, an International Vice President of the Switchmen's Union was there as spokesman for the Union and Mr. W. T. Stultz, Assistant Trainmaster at Kingsport, Tennessee, was also present.

At this meeting or session of the Public Law Board, the positions of the parties to the dispute were exchanged, and Mr. Beals, representing the Railroad Company, took exception to the statement of the claims submitted by the Switchmen's Union and stated to the Board that the statement of claim was not consistent with the provisions of the agreement establishing the Board and that it contained matters over which the Board had no jurisdiction. He further called attention to the fact that the statement of claim presented by the carrier was confined only to the claims listed in the document establishing the Board and specifically called attention of the neutral to the fact that the Board's jurisdiction was confined to those claims listed in the agreement establishing the Board. I heard this statement made to the Board in my presence.

s R. E. Rice

R. E. Rice

Subscribed and sworn to before me this 6th day of February, 1969.

s Robert F. Sams

Notary Public

My Commission Expires November 6, 1972.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. 2290 Civil

SWITCHMEN'S UNION OF NORTH AMERICA

v.

CLINCHFIELD RAILROAD COMPANY

Exhibit C to Motion of Defendant for Summary Judgment

AFFIDAVIT OF W. T. STULTZ

STATE OF TENNESSEE
COUNTY OF SULLIVAN

I, W. T. Stultz, being first duly sworn, do make solemn oath that my name is W. T. Stultz; I reside at Kingsport, Tennessee; I am 53 years old; I am Assistant Trainmaster at Kingsport, Tennessee for the Clinchfield Railroad Company, the Defendant in the above entitled action; I have been employed by the Clinchfield Railroad Company for 29 years; and I know of my own personal knowledge the following facts to be true and correct:

On February 29, 1968 at the Conference Room in the General Offices of the Clinchfield Railroad Company at Erwin, Tennessee I was present at a meeting or session of the Public Law Board considering certain time claims arising out of piggyback operations at Kingsport. The members of the Board were Mr. L. R. Beals, Mr. P. K. Elliott and Mr. Arthur W. Sempliner, all of whom were present. Mr. George Clark, an International Vice President of the Switchmen's Union was there as spokesman for the Union and Mr. R. E. Rice, Trainmaster-Road Foreman of Engines, was also present.

At this meeting or session of the Public Law Board, the positions of the parties to the dispute were exchange, and Mr. Beals, representing the Railroad Company, took exception to the statement of the claims submitted by the Switchmen's Union and stated to the Board that the statement of claim was not consistent with the provisions of the agreement establishing the Board and that it contained matters over which the Board had no jurisdiction. He further called attention to the fact that the statement of claim presented by the carrier was confined only to the claims listed in the document establishing the Board and specifically called attention of the neutral to the fact that the Board's jurisdiction was confined to those claims listed in the agreement establishing the Board. I heard this statement made to the Board in my presence.

W. T. STULTZ

W. T. Stultz

Subscribed and sworn to before me this 6th day of February, 1969.

/s/ NORMA K. COBB

Notary Public

My Commission Expires August 3, 1970.

C-25

July 31, 1967
File: SUNA

Mr. P. K. Elliott, General Chairman
Switchmen's Union of North America
Erwin, Tennessee

Dear Sir:

Referring to your letter of June 26, 1967, and returning, respectfully disallowed, the claims of S. W. Pilkington and others, which claims are listed in your letter, covering the handling of aprons at Kingsport:

There is no rule of the agreement violated by performing this service.

Moreover and aside therefrom, you have failed to handle these claims in accordance with the provisions of Article 23 of the existing agreement, and for this reason, as well, the claims are not subject to consideration.

Yours very truly

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE.
NORTHEASTERN DIVISION

No. 2290 Civil

SWITCHMEN'S UNION OF NORTH AMERICA
v.
CLINCHFIELD RAILROAD COMPANY

ANSWER

FIRST ISSUE

This Court is without jurisdiction of this action; because the award filed as Exhibit "A" to the Complaint does not direct the defendant to comply therewith on or before a day named, as required by Title 45 USC § 153, as amended by Public Law 89-456 approved June 20, 1966, and the Complaint manifestly fails to allege that the Defendant has failed to comply with said award within the time therein limited, as required by said title and section of the Code.

SECOND DEFENSE

The Complaint fails to state a claim against the Defendant upon which relief can be granted, because the award, Exhibit "A" to the Complaint, manifestly fails to comply with and conform to Title 45 USC § 153, as amended by Public Law 89-456 approved June 20, 1966, in that it does not direct the Defendant to comply therewith on or before a day named.

THIRD DEFENSE

1. Defendant admits the allegations contained in the first paragraph of Section I of the Complaint, except to the

extent Defendant alleges it is without knowledge or information sufficient to form a belief as to the truth of so much of the same as charges Plaintiff is incorporated; the allegations contained in the second paragraph of Section I of the Complaint, except to the extent Defendant denies it is a corporation; and the allegations contained in the second paragraph of Section III of the Complaint.

2. Defendant denies the allegations contained in Section II of the Complaint, except to the extent Defendant alleges Plaintiff seeks to invoke jurisdiction under the law therein mentioned; the allegations contained in the first paragraph of Section III of the Complaint, except to the extent Defendant alleges that on August 22, 1967, in Erwin, Tennessee, Plaintiff and Defendant, pursuant to Public Law 89-456 approved June 20, 1966, joined in an agreement establishing a Special Board of Adjustment for the purpose of disposing of time claims which were listed in the docket appended to said agreement as Attachment "A", a copy of which agreement with the docket appended thereto as Attachment "A", is hereto attached, marked Exhibit "1" and made a part of this Answer; the allegations contained in the third paragraph of Section III of the Complaint, except to the extent Defendant alleges that said award sustained the claims of those named in the docket appended as Attachment "A" to the agreement marked Exhibit "1" hereto, as per the findings in said award; the allegations contained in Section IV of the Complaint, except to the extent Defendant alleges that said award is final and conclusive upon it as to those named in the docket appended as Attachment "A" to the agreement marked Exhibit "1" hereto, for the dates listed therein, and that the Defendant has made payment to the persons listed in said docket for the days listed therein; the allegations contained in Section V of the Complaint; and the allegations contained in Section VI of the Complaint.

Fourth Defense

So much and such parts of the award, filed as Exhibit "A" to the Complaint, as purport to rule upon or decide claims

of claimants and of dates not set out in the docket appended as Attachment "A" to the agreement filed as Exhibit "1" to this Answer, exceed the scope of the cases as defined by said agreement and are therefore outside the agreement of the parties and are null and void.

Fifth Defense

1. On August 22, 1967 in Erwin, Tennessee, pursuant to Public Law 89-456 approved June 20, 1966, the Plaintiff and Defendant joined in an agreement establishing a Special Board of Adjustment to resolve disputes as to the time claims which were listed in the docket appended thereto as Attachment "A" as set forth in the agreement and appended attachment filed as Exhibit "1" to this Answer.

2. At the time of joining in said agreement, the Plaintiff through its contracting representative recognized that all claims and grievances of this nature involved in a decision of the highest officer more than 6 months previous thereto were barred under Subsection (c) of Article 23 of the Collective Bargaining Agreement and intentionally eliminated the same from listing in the docket. Also at said time the Defendant's representative knew of no other claims than those listed in the docket.

3. In the submission of the respective parties to the Special Board, when the Plaintiff asserted that the Board was to determine claims not listed in the docket, the Defendant immediately protested and asserted that the Board was without jurisdiction, because such claims were outside the submission.

4. On or about March 1, 1968 the Board rendered its award, sustaining claims as per the findings of the award, a copy of which award is filed as Exhibit "1" to the Complaint.

5. Before this action was commenced the Defendant paid all persons listed in the docket for the dates listed in the docket as shown in the Attachment "A" to the agreement filed as Exhibit "1" to this Answer.

6. By reason of the premises Defendant pleads performance of the agreement in bar of the Plaintiff's suit.

COUNTERCLAIM

The Defendant, for its Counterclaim against the Plaintiff, alleges and says:

1. This is an action brought to set aside an award of a Special Board of Adjustment as outside the scope of the agreement submitting the same, of which the Court has jurisdiction under Title 28 USC § 1337 and Title 45 USC § 153 as amended by Public Law 89-456 approved June 20, 1966.

2. On August 22, 1967 at Erwin, Tennessee when the Plaintiff was the duly certified representative of the employees of the Defendant of the class of switchmen, and the Defendant was an interstate carrier by railroad, there were controversies as to pay of 6 switchmen at Kingsport, Tennessee, for additional compensation in connection with the piggy-back operations.

3. On said date at Erwin, Tennessee, pursuant to Public Law 89-456, the Plaintiff and Defendant joined into an agreement establishing a Special Board of Adjustment to determine the time claims of these 6 employees for certain days as listed in the docket marked Attachment "A" to the agreement, a copy of which agreement is attached to the Answer as Exhibit "1".

4. At the time of the entry into the agreement for submission of these disputes the Plaintiff through its representative recognized that the controversies which had been ruled on by the highest officer of the Defendant more than 6 months previous were barred by subsection (c) of Article 23 of the Collective Bargaining Agreement, and eliminated the same from the list in the docket attached to the agreement, and the representative of the Defendant knew of no similar claims then existing against the Defendant.

5. When written submissions were made to the Special Board of Adjustment, the Plaintiff asserted that the arbitration applied to claims of claimants and dates not set forth in the docket attached to the contract, and the Defendant protested and refused to be bound by determination of any claims except those listed in the docket appended to the submission agreement.

6. On or about March 1, 1968 the Special Board of Adjustment made its award sustaining the claims as per its findings, a copy of the award exhibited as Exhibit "1" to the Complaint.

7. Defendant immediately paid the claims of all the persons listed in the docket for the dates listed in the docket attached to the agreement, Exhibit "1" to the Answer.

8. The Plaintiff wrongfully and improperly contends that said award applies to claimants and dates not listed in the docket appended to the submission agreement.

9. Defendant claims and contends that the award is limited to the dates and persons named in the docket which was the scope and extent of the submission.

10. Wherefore the Defendant prays:

(a) That the Plaintiff's Complaint be dismissed.

(b) For a judgment holding and declaring that the award filed as Exhibit "A" to the Complaint is limited to the persons and dates listed in the docket attached to the submission agreement filed as Exhibit "1" to the Answer.

(c) For costs and disbursements.

(d) For such other and further relief as to the Court may seem just and proper.

FERDINAND POWELL, JR.

Ferdinand Powell, Jr.
Attorney for the Defendant

Address:
2101 North Roan Street
Johnson City, Tennessee 37601

HARRY W. LAWRENCE

Harry W. Lawrence
Asst. General Solicitor of Clinchfield Railroad Company of Counsel for Defendant

Address:
Law Department
Clinchfield Railroad Company
Erwin, Tennessee

CERTIFICATE

I, the undersigned, attorney for the Defendant in the above entitled action, hereby certify that on the 26th day of November, 1968, I served the above Answer and Counterclaim upon T. R. Bankdy, Jr. and Russell M. Baker, Esqs., attorneys for the Plaintiff, by depositing true copy of the same in the U. S. mails, with the proper first class postage prepaid thereon, one addressed to Mr. T. R. Bandy, Jr., P. O. Box 1127, Kingsport, Tennessee, and the other addressed to Mr. Russell M. Baker, Baker, Jordan and Foreman, 1610 Tower Petroleum Building, Dallas, Texas, 75201, their respective offices and post office addresses.

FERDINAND POWELL, JR.

(3)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

Civil Action No. 2208

SWITCHMEN'S UNION OF NORTH AMERICA

v.

CLINCHFIELD RAILROAD COMPANY

PLAINTIFF'S REPLY TO DEFENDANT'S
COUNTERCLAIM

The Plaintiff, in reply to Defendants' Counterclaim, says:

I

Plaintiff admits that this Court has jurisdiction as alleged in Paragraph I.

II

Plaintiff admits the allegations in Paragraphs II except how there was controversy as to only six switchmen at Kingsport, Tennessee.

III

Plaintiff admits the allegations contained in Paragraph III except that it denies that the Special Board of Adjustment was constituted for the purposes of determining only the claims of the six employees listed in Exhibit "1" and the dates set forth therein.

IV

Plaintiff denies the allegations contained in Paragraph IV.

V

Plaintiff denies the allegations in Paragraph V.

VI

Plaintiff denies the allegations of Paragraph VI and says that the award covered not only the claims set forth in Exhibit "1" but "all other claims and dates of record."

VII.

Plaintiff admits that Defendant paid those employees listed on Exhibit "B", Attachment "A".

VIII.

Plaintiff denies the allegations in Paragraph VIII.

IX.

Plaintiff admits the allegations in Paragraph IX.

WHEREFORE, Plaintiff says that the relief prayed for in said Counterclaim should be denied.

T. R. BANDY, JR.
P. O. Box 1127
Kingsport, Tennessee

and

BAKER, JORDAN & FOREMAN
1610 Tower Petroleum Bldg.
Dallas, Texas 75201

BY RUSSELL M. BAKER

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, RUSSELL M. BAKER, Attorney of Record for the Plaintiff, do hereby certify that I served the above and foregoing Plaintiff's Reply to Defendants' Counterclaim upon Hon. Ferdinand Powell, Jr. Attorney for Defendant herein, on the 21st day of December, 1968, by mailing a copy to him at 2101 North Roan Street, Johnson City, Tennessee 37601, postage prepaid, properly addressed, by certified mail, return receipt requested, last known address of Attorney for Defendant.

RUSSELL M. BAKER

Russell M. Baker

C-34

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
NORTHEASTERN DIVISION

No. 2290 Civil

SWITCHMEN'S UNION OF NORTH AMERICA

v.

CLINCHFIELD RAILROAD COMPANY

MOTION OF THE DEFENDANT FOR SUMMARY JUDGMENT

Defendant moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the Defendant's favor dismissing the claim alleged in the Complaint, and for the relief demanded in the Counterclaim on the ground that there is no genuine issue as to any material fact and that the Defendant is entitled to judgment as a matter of law.

This motion is based upon:

(a) The pleadings on file in the action.

(b) The affidavits of L. R. Beals, Rheba Pratt, W. T. Stultz and R. E. Rice, attached hereto, marked Exhibits "A", "B", "C", and "D", respectively to the Motion of the Defendant for Summary Judgment, and made a part hereof.

In accordance with the Rules of this Court a memorandum brief in support of this Motion accompanies the Motion.

FERDINAND POWELL, JR.

Ferdinand Powell, Jr.
Attorney for the Defendant
Address:
2101 North Roan Street
Johnson City, Tennessee 37601

HARRY W. LAWRENCE

Harry W. Lawrence
Asst. General Solicitor of Clinchfield Railroad Company of Counsel for Defendant
Address:
Law Department
Clinchfield Railroad Company
Erwin, Tennessee

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
NORTHEASTERN DISTRICT

No. 2290 Civil

SWITCHMEN'S UNION OF NORTH AMERICA
v.
CLINCHFIELD RAILROAD COMPANY

REPLY IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO SAID HONORABLE COURT:

Plaintiff in reply to Defendant's Motion For Summary Judgment says that there is genuine issues as to material facts in this case as shown by the Affidavit of George Clark attached hereto, marked Exhibit "A" and the following Exhibits "B" & "C".

Respectfully submitted,

s/ RUSSELL M. BAKER

OF: BAKER, JORDAN & FOREMAN
1610 Tower Petroleum Building
Dallas, Texas 75201
Attorneys for Plaintiff

Supreme Court, U.S.
FILED
JUL 18 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 279

UNITED TRANSPORTATION UNION,

Petitioner,

—v.—

CLINCHFIELD RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorney for Respondent

Of Counsel:

FERDINAND POWELL, JR.
Johnson City, Tennessee

HARRY W. LAWRENCE
Erwin, Tennessee

ARNOLD & PORTER
Washington, D. C.

July, 1970

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Other Authority:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 279

UNITED TRANSPORTATION UNION,

Petitioner,

—v.—

CLINCHFIELD RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1970, and a timely petition for rehearing was denied on March 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the lower courts correctly concluded that the Submission Agreement submitting claims to a Special Board of Adjustment under Section 3 *Second* of the Railway Labor Act (45 U.S.C. §153 *Second*) involved in this case was limited to the claims listed on Attachment "A" to the Submission Agreement, where the Submission Agree-

ment stated that the Special Board was established "for the purpose of disposing of time claims which are listed in the docket appended hereto as Attachment 'A' . . . . . ", and that the Special Board "shall have jurisdiction of the docket attached hereto."

STATEMENT

The respondent, Clinchfield Railroad Company ("Clinchfield") and the Switchmen's Union of North America ("Union") (now a part of the petitioner, United Transportation Union) on August 22, 1967 executed an agreement to submit certain employee wage claims to a Special Board of Adjustment for decision. Section 3 *Second* of the Railway Labor Act provides a procedure whereby a rail carrier and a union may submit to a Special Board of Adjustment disputes which otherwise would be subject to resolution by the National Railroad Adjustment Board.[1] That Section provides: "The cases which may be consid-

[1] Section 3 *First* of the Act provides a compulsory arbitration procedure administered by the National Railroad Adjustment Board for the settlement of grievances or so-called "minor disputes." See *Elgin, J. & E.R. Co.* v. *Burley*, 325 U.S. 711, 723-28 (1945). In its original form, Section 3 *Second* of the Act, as enacted in 1934 (Act of June 21, 1934, c. 691, 48 Stat. 1189) simply provided that nothing in the provisions establishing the National Railroad Adjustment Board should be construed to prevent carriers and employees from mutually agreeing to the establishment of system, group, or regional boards of adjustment for purposes of adjusting disputes of the character provided in Section 3.

Public Law 89-456, June 20, 1966, 80 Stat. 208, 209, added the second paragraph of Section 3 *Second* of the Act. The new provisions were added to the Act by Congress in an effort to encourage greater use of Special Boards of Adjustment by providing a procedure whereby either the carrier or the union could initiate steps to have a Special Board organized. This was deemed important by Congress in the light of the heavy backlog of some divisions of the National Railroad Adjustment Board. See S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), pp. 1-2. Since the enactment of the 1966 amendment, Special Boards have commonly been styled "Public Law" boards. See Pet. App. C-1, C-4.

ered by such board shall be defined in the agreement establishing it."

The written agreement (Pet. App. C-4, C-6) of the parties establishing the Special Board (the "Submission Agreement") did not contain any general definition by their type of the sort of claims which the Special Board was to consider, but simply provided that the Board was to be established "[f]or the purpose of disposing of time claims which are listed in the docket appended hereto as attachment 'A' . . . ." and that the Board "shall have jurisdiction of the docket attached hereto." (Pet. App. C-4) Attachment A, the Docket Sheet, in turn listed the claims of six men, H.T. Martin, L.W. Brown, W.A. Callahan, S.W. Pilkington, D.H. May, and G.A. Cowden, on 26 specified days, and recited that the listed claims were: "Account Yardmen handling aprons at piggyback track, Kingsport, Tennessee, in alleged violation of agreement." (Pet. App. C-6)

The Special Board met on February 29, 1968, and the next day entered an award on the claims which had been submitted to it. That award recited that: "[c]laim is being made for one day's pay at pro-rata rate for Switchman H. Martin, January 13, 1967, and all other claimants and dates of record, account of Switchmen performing other than their regular duties, i.e., lifting and placing Steel Aprons (runways) on Piggyback Cars, on Piggyback Track, Kingsport, Tennessee." (Pet. App. C-1) The award was favorable to the claims for an extra day's pay, on the theory that the switchmen were being asked to do the work of carmen in handling the aprons, and concluded: "Claims sustained as per findings." (Pet. App. C-3)

Clinchfield proceeded to pay the six workers listed on the Docket of the Special Board an extra day's pay for the 26 days that were listed on that Docket. However, the

Union then nonetheless brought suit in the District Court for the Eastern District of Tennessee, under Section 3 of the Railway Labor Act, purportedly to enforce the award, but demanding judgment in favor of 27 named workers with respect to a total of 227 working dates. (C. A. App. A-5)[2] These were workers and/or dates different from those listed on the Special Board's Docket Sheet. (Pet. App. C-6)

After answer, Clinchfield filed a motion for summary judgment. In connection with that motion, Clinchfield filed a supporting affidavit of its Personnel Officer that the additional claims specified in the Complaint which were not submitted on the Docket Sheet to the Special Board had been voluntarily dropped by the Union's representative when the Docket was made up for attachment to the Submission Agreement, upon that representative's agreeing with Clinchfield's Personnel Officer that the additional claims were barred by a time limitation on claims set forth in Article 23 of the general agreement between the Union and Clinchfield. (Pet. App. C-16) The Union submitted an opposing affidavit disagreeing with this and asserting that there was a general practice only to list a few claims in a submission to a Special Board as a specimen or pattern of claims.[3] (Pet. App. C-8, C-9) The affidavit provided no detail as to this alleged practice and did not explain why

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[2] We so refer to the Appendix attached to petitioner's brief in the Court of Appeals.

[3] The affiant alleged that there had been 25 years of tradition—based solely on his assertion—to support this practice. Since the 1966 statutory amendment (see note 1, p. 2, *supra*) defining for the first time the functions and powers of Special Boards had been on the books only 13 months at the time of the making of the affidavit, it is hard to attach any relevance to the allegation. The 1966 amendment is perfectly clear that: "The cases which may be considered by such [special] board shall be defined in the agreement establishing it."

as many as 26 claims were necessary to provide such a specimen. The affidavit did not, however, contend that there was acquiescence by Clinchfield in any consideration by the Special Board of more than the 26 claims, and the affidavit of Clinchfield's Personnel Officer also made it plain that there was no such acquiescence.

The District Court granted Clinchfield's motion for summary judgment. It found it unnecessary to resolve the question whether the award's reference to the claim of "Switchman H. Martin, January 13, 1967, and all other claimants and dates of record . . . . " was meant simply to cover the other 25 claims listed on the Docket Sheet or more broadly intended to cover all possible claims by switchmen on account of raising aprons on piggyback cars at the Kingsport yard. (Pet. App. A-7) It concluded, however, that in any event, under the provisions of Section 3 *Second* of the Railway Labor Act, even if the Special Board had purported to decide more than the 26 claims submitted to it on the Docket Sheet attached to the Submission Agreement, its action to that extent would have been a nullity. Since Clinchfield had paid the award with respect to the 26 claims listed on the Docket Sheet, the Court awarded summary judgment to Clinchfield. (Pet. App. A-8)

The Court of Appeals for the Sixth Circuit unanimously affirmed *per curiam*, holding that only the claims specified in the Submission Agreement could be considered by the Special Board.

ARGUMENT

1. The rulings of the two courts below that only the 26 claims for the six men listed on the Docket Sheet could be considered and acted upon by the Special Board are clearly correct. Section 3 *Second* of the Railway Labor Act as amended by the 1966 amendment expressly provides that: "The cases which may be considered by such [special] board shall be defined in the agreement establishing it." Here the Submission Agreement was perfectly clear that the claims submitted were those "listed on the docket appended hereto as attachment 'A' . . . ."; and that the Board was to "have jurisdiction of the docket attached hereto." That Docket listed only the 26 claims of the six workers which Clinchfield in fact paid after the award.

Indeed it is far from clear that the award even purported to pass on more than the 26 claims of the six men listed on the Docket Sheet. The award specifically referred to one of the listed claims, that of H. Martin for January 13, 1967, and then referred to "all other claimants and dates of record"; there is no evidence that the record which was referred to was other than the Board's own Docket which listed the other 25 claims submitted to it. But even if the award were viewed as being ambiguous, as the District Court viewed it, the ambiguity must be resolved in such a fashion as to keep the award within the provisions of the Railway Labor Act.

2. The Union suggests (Pet. 11-17) that the summary judgment granted here was improper, citing the conventional authorities to the effect that summary judgment is improper under Civil Rule 56(c) if there is a controverted issue of material fact. See, *e.g.*, *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962). The position of the Union is that

because there were differing reasons on the two sides as to why only the 26 claims of the six men were listed on the Special Board's Docket Sheet, and because the affidavits indicated that the parties took different views as the hearing as to the scope of the Special Board's authority, summary judgment was improper. But the basis of the District Court's decision was that the text of the Submission Agreement, and to a lesser extent, the text of the award itself, was dispositive of any claim that the award was or could be for the benefit of others than the six men named in the Docket Sheet and with respect to the 26 claims listed thereon. There was no dispute as to what the Submission Agreement or the award itself said; they speak for themselves. The District Court held, as a matter of law, on the basis of the Submission Agreement and the award, that the claim under the award for men and days other than those listed on the Docket Sheet was unfounded. The conclusion was one of law—as to the Special Board's jurisdiction. Any matters as to which there might have been a factual dispute are irrelevant to that conclusion.

3. The Union also suggests (Pet. 18-19) that the decision below somehow conflicts with *Brotherhood of Railway Clerks* v. *Special Board of Adjustment*, 410 F.2d 520, 522-23 (7th Cir. 1969). That case holds that Congress has not authorized any procedure for the review of an award by a Special Board of Adjustment at the suit of a party aggrieved by its award, similar to the procedure for such review authorized by Congress in the case of an award by the National Railroad Adjustment Board through its amendment to the Railway Labor Act in 1966.

But it is clear that Congress has authorized a suit, such as that of the Union here, to enforce an award of a Special Board of Adjustment; the final sentence of Section 3 *Second* of the Act expressly provides that: "Compliance

with such awards [of special boards] shall be enforcible [*sic*] by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board." Those last-mentioned provisions are contained in Section 3 *First* (p) of the Act.[1] Nothing in the *Clerks* case or in Section 3 *First* (p) suggests that a party against whom an award is made may not defend an enforcement suit on the grounds that properly construed in its own terms and in the terms of the authority under which the award was rendered,[2] the award

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[1] One of the basic purposes of the 1966 amendment was to add subsection (q) to Section 3 *First* of the Act, providing for judicial review at the instance of a party aggrieved by an award of the National Railroad Adjustment Board. See S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), pp. 2-3. That amendment, which added the second paragraph of Section 3 *Second* to the Act, incorporated, in effect, the enforcement provisions of Section 3 *First* (subsection (p)) but not the judicial review provisions of subsection (q) of that Section.

[2] In a suit for enforcement of an order of the National Railroad Adjustment Board under Section 3 *First* (p) (a subsection whose procedure was made applicable to awards of Special Boards by the 1966 amendment to Section 3 *Second*), the party against whom enforcement is sought may defend on the grounds of the failure of the order of the Adjustment Board "to conform, or confine itself, to matters within the scope of the division's [of the Adjustment Board] jurisdiction . . . ." Here, if the award is construed as applying to claims other than those listed on the Docket Sheet, it would be beyond the Special Board's jurisdiction and hence impeachable. The Union makes the unsupported suggestion that all that the statutory reference to "jurisdiction" means in this context is whether the dispute in question could properly have been decided by the Adjustment Board, rather than by the Special Board. (Pet. 23) But the text of Section 3 *Second* refutes this contention. The seventh sentence of the second paragraph of Section 3 *Second* provides that: "The members of the [special] board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the [special] board." Thus, it is obvious that matters as to the Special Board's "jurisdiction" may be fixed by the parties by agreement, as was done here in establishing the Special Board's Docket.

did not grant and could not have granted the relief ascribed to it in the complaint. All the *Clerks* case holds is that an unsuccessful party before a Special Board may not bring a proceeding—as he might do with respect to an award of the National Railroad Adjustment Board—to review an award adverse to him. But Clinchfield here, the party against whom the award was rendered, brought no such review proceeding; it paid the award as to the cases listed on the Docket Sheet. It simply defended against an extravagant and unwarranted interpretation of the award and the Submission. Agreement by the Union in an enforcement suit filed by the Union.[3]

It would be an absurdity to suggest that however extravagant a construction is attached to the award by the party prevailing under it, the courts have no jurisdiction to do other than enforce the award in accordance with whatever contentions the prevailing party chooses to make as to its meaning. But that is precisely the effect of the position taken by the petitioner here, which the courts below quite properly rejected.

4. The Petition for Certiorari raises no legal question whatsoever of general applicability or of general importance in the administration of the Railway Labor Act. The issues tendered are peculiar to this case and turn on the con-

[3] The Union cites various cases (Pet. 23-25) giving literal effect to the provision of Section 3 *First* (p) that a suit to enforce an award may be brought by "any person for whose benefit such order [of the Adjustment Board] was made." In effect, this provision has been held to permit individual workers, as well as a union, to bring an enforcement suit. But the Union's argument simply begs the question whether the claims pressed by it on behalf of the additional workers and for additional days in the District Court were claims decided by the Special Board or which, indeed, that Board had the power to decide under the Submission Agreement. Thus, the contention is simply beside the point.

struction of a particular Submission Agreement to a single Special Board of Adjustment. No conflict of circuits or other basis for granting certiorari is developed by petitioner. For these reasons, and in the light of the clear correctness of the decisions of the two courts below, further review is not warranted.

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

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July, 1970